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IMMIGRATION REFORM AND THE REORGANIZATION OF HOMELAND DEFENSE

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BEFORE THE

SUBCOMMITTEE ON IMMIGRATION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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WEDNESDAY, JUNE 26, 2002

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:13 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Edward M. Kennedy, Chairman of the Subcommittee, presiding.

Present: Senators Kennedy, Feinstein, Durbin, and Brownback.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Chairman KENNEDY. We will come to order.

Today, our Subcommittee considers the many immigration issues relating to homeland security reform. Immigration is a central part of our heritage and history, and essential to who we are as Americans. In defending the Nation, we cannot lose sight of our tradition as a Nation of immigrants and a safe haven for the oppressed.

The administration's proposal to include the Immigration and Naturalization Service in the new Department of Homeland Security raises serious questions about the consequences for immigration law and policy, and the adjudication of immigration services and benefits.

Reorganization may help in some instances to improve the lines of command, but it is not a panacea. A reshuffling of agencies that fails to address such fundamental problems as poor information-sharing, inefficient management structures, and insufficient resources will do little to improve security for the American people.

This is particularly true for the Immigration and Naturalization Service, which has been plagued with problems. Simply including immigration functions in a new, larger department, without instituting essential reforms, will not solve the agency's problems and will not enhance our security. Simply put, reorganization without reform will not work.

I have been working with Senator Brownback, Senator Feinstein, and others on this subcommittee to examine ways to restructure the INS and bring our immigration system into the 21st century. We have introduced comprehensive legislation to reform the agency and provide a more effective and efficient framework to meet our immigration responsibilities.

With respect to the administration's proposal, I am concerned about moving immigration service functions, such as naturalization

and asylum and refugee adjudications, into a new department that has as its principal mission preventing terrorism.

It will be difficult to transfer the enforcement functions of INS to the Department of Homeland Security and leave the service functions of INS in the Department of Justice. Under this scenario, the service functions, already the step-child of the INS, will be further neglected and weakened. In order to protect these very important service functions, it may be better to transfer all of INS to Homeland Security, but raise the status of immigration in that agency.

Under the President's plan, immigration is located in one of four divisions, the Border and Transportation Security Division—I know everyone has seen those organization charts—which gives little recognition to the need for close ties between the service and enforcement functions.

To remedy this problem, a fifth division, Immigration Affairs, could be created that would contain bureaus of enforcement and immigration services set up along the lines of our legislation. This option would ensure better coordination between services and enforcement, institute much needed reforms in INS, and place services in a position where they could be a more equal partner in the mission.

In any scenario, an Office of Juvenile Affairs, as proposed in our legislation, should be created, but it should not be placed in Homeland Security.

We must also reconsider the best place for the Executive Office for Immigration Review, the immigration court system. Moving this office into a new security department would undermine its ability to independently hear and decide important immigration matters. Supporting is growing to create an independent agency to oversee this important function.

Finally, I am concerned about the administration's proposal to move the Department of State's visa issuance function to the new Homeland Security Department. Consular officers are trained as diplomats to represent the U.S., and the manner in which they fulfill those duties can have a significant impact on our relations with foreign countries. With accurate and timely information, the State Department is well equipped to continue to handle the issuance of visas. We have already spent a lot of time on this issue, in terms of the border security issues to deal with those questions.

I look forward to working with the administration and my colleagues to see that the current reorganization deals effectively with these important issues. I thank the witnesses for being with us and look forward to their testimony. I call on Senator Brownback.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you, Mr. Chairman, for holding the hearing. It is an important topic and it is an important discussion for us to have.

First, I would like to commend the President and Governor Ridge for their heartfelt commitment to enhancing the security of this

great Nation. This is a great and noble task, and I admire them for their work. I support the President's efforts to create a Homeland Security Department, and agree that the formation of that department is time-sensitive. We need to move forward rapidly.

Still, we have to be careful that, despite the urgency, we get it right. As you just said, the two of us have been working on and studying INS reform for some time and agree on the importance of a coordinated immigration agency, true to a dual mission of immigration enforcement and immigration services.

Mr. Chairman, I take great pride in the fact that the Border Security Act, which we and our colleagues on the committee drafted—Senator Kyl, Senator Feinstein, Senator Hatch, and others—was intelligent and balanced. We were true both to our responsibility to protect our great Nation from those who mean us harm and to keep our country open to those who mean us well.

As we consider not just restructuring the INS, but reconfiguring large segments of our Federal Government, we must be mindful of both of these responsibilities. We also must keep in mind that enforcing immigration laws is complex, and immigration enforcement goes well beyond any gatekeeper function.

Not only do we need to intercept terrorists, but we also need to investigate fraud, remove criminal aliens, and enforce employment-related immigration laws. Additionally, immigration functions are not limited to the ports of entry. In fact, they extend to a wide array of determinations that are made within the United States.

Those determinations range from naturalization and citizenship applications, to family and business petitions, to work permits and employer sanctions. These are the services that are currently provided by the INS, and we must be careful that in our rightful zeal to thwart terrorism we don't alienate our families, friends, and business partners in the process.

The role of services to enforcement and security cannot be overlooked. Good services mean good security. Prompt adjudication closes security loopholes and deters fraud, all the while showing proper regard for the families, businesses, and aspiring citizens that file those applications.

In the immigration context, enforcement and services must be coordinated. They must operate hand-in-hand. We can, and must, enforce the immigration laws effectively and provide timely and competent immigration services. This must take place wherever immigration responsibilities are located.

Mr. Chairman, I appreciate your concerns about the movement particularly of the EOIR away from the Justice Department. We certainly do not want to compromise unbiased courtroom review of immigration cases, and we should either keep the immigration court system with the Department of Justice or set up an independent agency. This is a topic worthy of further discussion.

I look forward to us working on this, and I would want to join a comment that the chairman made about we had already put forward a proposal for restructuring of the INS. I don't think it serves us well to move an agency lock, stock and barrel but not reform it.

INS was broken before the proposal for a Homeland Security Agency. It remains that way and it needs to be fixed before it goes

anywhere or stays where it is. I think we need to get this right and we need to do it right. We have a proposal that we have put forward, the House of Representatives has passed a proposal, and the administration has put forward a proposal. I am hopeful that we can work those together, get this agency formed the right way, and get us moving further down the road.

Thank you for holding the hearing.

Chairman KENNEDY. Thank you.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I would just like to begin by acknowledging the presence of two distinguished Californians. You have the good taste of knowing where the body of knowledge on this issue rests and I commend you for it.

I would like particularly to acknowledge the presence of Professor Bill Ong Hing, of the University of California at Davis School of Law, and Judge Dana Marks Keener, President of the National Association of Immigration Judges. They are both San Francisco residents, and so it is great to have you here.

Mr. Chairman, this is now my third hearing. Yesterday, the Terrorism and Technology Subcommittee heard Senator Rudman on his report. We heard from Governor Gilmore on his, and two experts from Brookings and one from the Cato Institute. This morning, the full committee heard Governor Ridge make his presentation.

As you know, the Hart-Rudman Commission recommended that just the Border Patrol go into a homeland defense or security type agency. As I have watched INS over the past decade, I would like to just kind of summarize what I have seen.

What I have seen is dramatic mission overload, and then, second, equally dramatic mission conflict. By that I mean the humanitarian concerns versus the national security concerns which, of course, have been crystallized by what happened on 9/11.

The agency, although it has enforcement functions, keeps getting humanitarian-type messages, I think, both from the Congress as well as from the organizations that traditionally lobby here. Therefore, what has evolved is an organization that really isn't tightly controlled, has this mission conflict, is technologically insufficient, and does not have adequate modern management oversight. It has created almost a paralysis in certain areas.

We have seen since 9/11 that the INS suffers from a lack of high-quality information on potential threats to national security.

Senator you mentioned that you didn't think the visa authority ought to be in the new homeland defense agency. I do. Senator Kyl and I conducted a hearing. We had Mary Ryan, from the State Department, who presides over the consular affairs offices, and she told us that when the hijackers came in for visas in Saudi Arabia, they looked in their system and they had no intelligence about those hijackers. As a matter of fact, she got very upset because she said "we granted their visas and we feel like we ran over a child on the highway; that is how badly we feel about it."

It really pointed out that, at least in terms of our systems, national security certainly wasn't a concern in giving visas. It is today, and therefore I feel very strongly that the visa aspects ought to be in the department. I feel very strongly that there is good evidence to say that enforcement and service, because they have been so conflicted within the agency, might be better approached in separate agencies.

Now, having said that, I asked the question this morning of Governor Ridge and I pointed out to him that we have 5,000 unaccompanied children who are in custody under INS today, with no resort to counsel, with no resort to an ad litem guardian, unable to speak the language.

If you look back at Elian Gonzalez, if it weren't for his having a family in Miami, he could well have been in an institution somewhere for a long time. There are 5,000 children like that on any given day of the year. We have been trying to change that.

I said to Governor Ridge that I don't think that an office of children's services should be in the homeland defense agency. I don't think that marriage fraud should be part of the mission of homeland defense. I don't think that workplace inspections should be part of homeland defense. I think it will just deter homeland defense.

In any event, my own view at this stage is that there are certain aspects of immigration that might well be transferred into a homeland defense agency, but I think we should take our time and look very carefully at what they are, because we do have a mission and national security as well as humanitarian efforts are part of that mission.

I am just not sure that if we put the entire INS within a huge, mega department that we are going to accomplish anything in terms of seeing that the service, as well as the enforcement, is well carried out.

Thank you.

Chairman KENNEDY. Thank you very much.

Senator Durbin has joined us.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thanks, Chairman, and I thank you and Senator Brownback for this hearing today.

I certainly listened carefully to my colleague, Senator Feinstein, and would agree with her general review of the Immigration and Naturalization Service. I might add, as well, that when it comes to technology, we are going to have to make some fundamental decisions here about the Immigration and Naturalization Service and the improvement of technology and how it will be used.

We just recently were told that the INS efforts to track one million international students in this country is behind schedule. Last month, Glen Fine, the Justice Department's Inspector General, said that the integration of the INS biometric fingerprint ID system and the FBI's fingerprint IAFIS system, quote, "remains years away."

In August of last year, the Inspector General concluded that the INS had failed to meet a mandate created by Congress in 1996 to

have an automated entry and exit control system. Six years and it hasn't happened.

When you think about the reorganization into a homeland security agency, it really calls into question our commitment to establishing modern technology in all of these agencies.

Back in 1939, scientists in America discovered nuclear fission. President Franklin Roosevelt created something called the Uranium Committee to decide whether or not that had a military application. It went nowhere, and then came Pearl Harbor, and in 1942 he appointed General Leslie Groves to be head of the Manhattan Project and gave him power, and $2 billion, I might add—$20 billion by today's standards—to pursue the Manhattan Project.

I think as we take a look at reorganization and moving boxes on charts, we ought to be asking some basic and fundamental questions about information technology and how it will be used by the FBI, by the INS, by the CIA and the NSA, all of these agencies. That should be an important part of this conversation.

The Justice Department said 3 weeks ago we are going to fingerprint and photograph millions of visa applicants coming into the United States. When? How? They certainly don't have the capability today to even consider that possibility. I think that has to be part of our consideration, too.

I am a cosponsor of Senator Kennedy's bill, and I will just close by adding one other footnote. I think history tells us that the biggest problems faced by those who want to emigrate to the United States come at times when the United States is facing an economic downturn or questions of security. We are facing both today, and I hope that the conversation about immigration, which is so critical in our past and to our future, is taken in a context that really is positive rather than negative.

Thank you, Mr. Chairman.

Chairman KENNEDY. Thank you very much.

Kathleen Walker testified before this committee earlier this year and it is a privilege to welcome her back. She is an attorney in El Paso, Texas, where she specializes in immigration, customs, and international transactions. She is a past president of the American Immigration Lawyers Association and has served on the National Board of Governors of the organization. She has also served as a board member of the Board of Trade Alliance and on the Texas Board on Infrastructure Coalition.

She was appointed to the State of Texas Comptroller of Public Accountants' Border Advisory Committee by the Comptroller. She is currently involved with the Immigration Subcommittee of the U.S. Chamber of Commerce. We want to welcome her back and thank her very much for being here.

Bill Ong Hing is a Professor of Law and Asian American Studies at the University of California at Davis. He is a member of the National Asian Pacific American Legal Consortium's National Advisory Council, and volunteers as general counsel of the Immigrant Legal Resource Center in San Francisco, which he founded.

He was appointed to the Justice Department's National Advisory Council by then-Attorney General Janet Reno to advise the Attorney General with regard to immigration, naturalization, and Border Patrol training and misconduct. He is the author of several

books on immigration and has represented immigrants before the INS for 30 years.

You are very welcome here, Professor.

David Martin is an expert on refugee, asylum, and immigration issues. He joined the faculty of the University of Virginia Law School in 1980, where he has taught citizenship, immigration and refugee law, and international human rights. He previously served as a special assistant to the Assistant Secretary of State for Human Rights and Humanitarian Affairs, and as General Counsel of the INS. He is currently Chair of the German Marshall Fund Project on Dual Nationality and of a working group on the same subject for the Carnegie Endowment Citizenship Project.

We are thankful for your presence here, Professor.

Dana Marks Keener has been an immigration judge at the U.S. Department of Justice's Executive Office for Immigration Review since 1987. She has served as a temporary board member of the Board of Immigration Appeals and is co-editor of the Immigration Judges Bench Book. She is President of the National Association of Immigration Judges and a member of the International Association of Refugee Law Judges. Before joining the bench, she was a partner in the immigration law firm of Simons and Unger.

Each of our witnesses has very significant experience in the field of immigration law and policy. We are grateful to them for being will to share that information with us here today and thank them for coming.

We will start with you, Ms. Walker.

STATEMENT OF KATHLEEN CAMPBELL WALKER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, EL PASO, TEXAS

Ms. WALKER. Chairman Kennedy and distinguished members of the committee, thank you so much for the opportunity to come back and provide this testimony on behalf of the American Immigration Lawyers Association. It was founded in 1946 and is comprised of about 8,000 attorneys and professors dealing with immigration issues here in the United States. We truly appreciate the opportunity to participate in the process with you.

Secondarily, it is an honor and a privilege to be able to discuss this critical development regarding the Office of Homeland Security and its impact on immigration issues. Certainly, we are very concerned that we work with you in the process, and we enjoyed that opportunity on the border security bill and will try to do so again here, but we have numerous concerns.

From my perspective, being on the border for about 16 years and looking across everyday when I go into work to Mexico, I know that we have talked about border issues in the past, and border security and integration of agency activity. Whether it be moving boxes or not, the fundamental issues of management, of structure, of staffing, of supervision, of funding—if those are not, as you have already all noted earlier, dealt with, whether we move it into the Office of Homeland Security or somewhere else, it will not be a success. And we would hope that we would be able to assist in making this a success.

Certainly, we believe it is an opportunity, as you, Senator Brownback, mentioned earlier—and Senator Kennedy, your bill,

2444, and Senator Durbin, you as well—with this option, if we can manage to get it reorganized and restructured to actually perhaps be non-dysfunctional, then we believe that if it goes into the Office of Homeland Security, we at least have a better shot at being effective.

Isn't the bottom line here that we are trying to deal with national security? How do we manage to be most effective to achieve that goal? With a dysfunctional agency dropped into another large organization, we have strong concerns.

In addition to that, think of the opportunity to also dovetail this into the ability to make legal immigration the norm by addressing labor needs that we have documented that we have either through a temporary worker program or not, or some other alternative.

In addition to that, what if we also look at the fact of dealing with people who are already here, hard-working people who desire to be legal, pull them out from the underground and make them participants in our society—we already know we need them—and give them a status? We believe that is an important part of this.

Don't forget, we have Mexico down there that needs us to go ahead and give them an avenue to assist us in achieving our goals. If we want a North American perimeter security zone, we need to be working with our trade partners to achieve it as a part of this, indeed make it an improvement of homeland security and also a part of North American security.

As far as what happens to immigration in the Office of Homeland Security, what we are hoping you would consider is perhaps a fifth prong, as Senator Brownback mentioned. We have been struggling that we should not use the "fifth column" reference. We would suggest a fifth prong or division in which one would place immigration services and security, and leave transportation on the other side of the blocks; in other words, divert the two.

Now, as to whether or not the Coast Guard and the Customs Service and APHIS also come into play within immigration services, it will be a matter of debate. I recognize that in the inspections context, you have those agencies working together, but until immigration is fully functional, perhaps a transitional phase is better to consider than dumping them all into one big block at this point in time.

I just know that the Homeland Security Office can serve a pivotal function in review and coordination that we have not had before in other attempts through the border coordination initiative or through unified port management. But it will be very difficult to coordinate all those bodies effectively, and we don't need to be uncoordinated at a time of heightened national security concerns.

We are also hopeful that we will have basically a border security division within this new prong, as well as immigration services and interior security. The predominant concern I have on just focusing on border security alone and dumping in inspections with the Border Patrol—inspections is that point where it is enforcement and adjudications tied together.

If I am just sitting there at primary inspections, really you can deal more with the data base check and leave secondary from a benefits perspective. So that is a consideration. Immigration services—of course, adjudications would fill in that area, as well as sec-

ondary inspections. Finally, interior security would be investigations, detention, and removal.

We also encourage you to consider the creation of a separate office under the Homeland Security Secretary of a civil rights division. We need to make sure that the public understands we still care and value treating people fairly. The tendency in an enforcement agency to not be as sensitive to ethnicity is high, and so we would hope that you would be able to consider that option.

In addition, as you stated earlier, as to the Executive Office for Immigration Review, who wants a boss who is dealing with both the prosecutor and the judge? It doesn't really allow for an effective review process. We support either an independent agency or an Article I court.

As for visa processing, Senator Feinstein, I respect your opinion greatly. I served as National Chairman of the Department of State Liaison Committee for AILA for 3 years and have been in that area of consular work for 16 years. Foreign policy and visa services, consular affairs, are hand-in-hand. The Secretary of State, through Consular Affairs, actually has been commended for their management.

As to national security not being an issue, I feel that the security advisory opinion process that they have had in place for years shows that they are very concerned. But if you don't have the name in the computer, how are they going to find you, and what can I ask you to know that you are going to become a terrorist, to be able to discern that just in a personal interview?

I want them to have the capacity to do that through added technology, added assistance, but I know that if I am trying to get certain trade negotiations dealt with or I want to protect U.S. citizens abroad or I need a deal from a particular country I am working with, I may coordinate that with my visa policy. Those are foreign policy issues.

We need to let them do their work, but at the same time allow the Office of Homeland Security to work with the Secretary of State in order to achieve those goals.

So that really sums up the discussion I have and I appreciate your patience. Basically, it is that let's go ahead and get it reorganized, use Senate bill 2444 for its purpose, don't lose the opportunity to make legality the norm on a going-forward basis, deal with our labor needs and facilitate it legally so we won't have this magnet, and finally go ahead and discuss the alternatives in-depth about the actual utility of moving these people from one category to another.

Thank you very much.

[The prepared statement of Ms. Walker appears as a submission for the record.]

Chairman KENNEDY. Thank you very much.

Professor Hing?

STATEMENT OF BILL ONG HING, PROFESSOR, UNIVERSITY OF CALIFORNIA-DAVIS SCHOOL OF LAW AND ASIAN AMERICAN STUDIES, ON BEHALF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, SAN FRANCISCO, CALIFORNIA

Mr. HING. Thank you. On behalf of the National Asian Pacific American Legal Consortium, I would like to thank Chairman Kennedy and Ranking Minority Member Senator Brownback for inviting us here to testify.

Almost two-thirds of the Asian American population are immigrants, and approximately one-third of the immigrants who come to the United States each year are from Asia, mainly to join other family members already here. As a result, the ability of the INS to function fairly, efficiently, and effectively has a significant effect on our community.

While having the Department of Homeland Security take over INS functions may seem attractive to some, the question that has to be answered is whether it makes sense. Implicit in this inquiry is a principle recognized by Congress in the Enhanced Border Security and Visa Entry Reform Act. Our most effective security strategy is to improve pre-screening of immigrants so as to keep out those who mean to do us harm, while admitting those who come to build America and make our Nation stronger.

The vast majority of immigrants and non-immigrants are simply not relevant to the issue of national security, and to make them so would pose an unnecessary distraction and a drain on resources of the new Homeland Security Department.

Long before September 11, INS miscues provided legitimate fodder for criticism and calls for reform, and even dismantling of the agency. But the need to reform INS and the need to provide better national security should not be confused. The temptation to conflate the two issues is enticing. They are related, but they are separate issues.

A successful reorganization of INS within an environment of an even more massive Government restructuring is highly unlikely. Moving INS may very well make it even more dysfunctional. Not only are family reunification and visa employment issues important for relatives and businesses, but immigration is vital to many parts of the United States.

As population declines in regions of the country such as Iowa, Pittsburgh, Philadelphia, Louisville and Baltimore, leaders in those areas recognize the need to attract more immigrants. They are looking to Washington for assistance in facilitating the entry of workers and families to their regions, knowing that immigrants can help to revitalize and sustain their communities.

The Department of Homeland Security simply cannot subsume every function of our national Government that encompasses a national security concern, but it can develop the expertise and focus to collect, process, and share anti-terrorism information with the entities responsible for administering the broad policy areas that cannot be effectively administered by one gargantuan agency.

But should Congress deem it necessary to at least transfer some border enforcement functions to the new department, immigration

and naturalization services should nevertheless remain within the Department of Justice and the State Department.

Services such as naturalization, green card processing, refugee and asylum processing, and employment-based visas need to be an in agency better able to foster a professional service mission and attract employees who have the skills and temperament suited for providing services to families, individuals, and businesses.

While service and enforcement functions of the INS clearly have areas of overlap, scrutiny of exclusion grounds does not have to be sacrificed in the development of a separate visa and naturalization service entity. Given cutting-edge technology that has been available for years from Silicon Valley-type companies but never implemented at the INS, issues of data storage, confidentiality, high-volume traffic, interagency communication, access, and security are quite possible.

In conclusion, let's be clear. As currently proposed, the homeland security initiative goes too far. By subsuming many functions from over 20 agencies that have little to do with national security, we have to wonder. Service functions in the current INS are already marginalized by a pervasive enforcement culture, and it is a pipe dream to think that if INS is moved in its entirety to the Homeland Security Department, a reorganization plan can fully protect service functions.

As an advisor to then-INS Commissioner Meissner, I witnessed constant frustration over attempts to professionalize many positions in the agency through better training, only to be derailed by a culture in the field that reinforced the old approach.

The problem of the Immigration and Naturalization Service as a second-class function in a new homeland security department will only get worse. Let's not sweep away rationality in our attempt to search for enemies.

Thanks.

[The prepared statement of Mr. Hing appears as a submission for the record.]

Chairman KENNEDY. Professor Martin?

STATEMENT OF DAVID A. MARTIN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Mr. MARTIN. Mr. Chairman, Senator Brownback, Senator Feinstein, I really appreciate the invitation to appear before you today.

As you know, we have been debating INS reorganization for well over 5 years. There were solid plans, pretty detailed plans in place in 1997 when I left office as INS General Counsel. I really expected we would be in a stage of implementing them within the Department of Justice by now.

Nonetheless, we now have a new context and, of course, a new urgency for considering reorganization questions—the President's proposal for a Homeland Security Department. I offer in my testimony, my prepared statement, three main points to keep in mind in considering how the immigration function should be dealt with in this new context.

First of all, immigration is about more than just enforcement and dangers. Although I hope that we will take from the September 11

events a determination to provide more resolute and consistent immigration enforcement, not only with regard to terrorists and criminals but more generally in effective enforcement of even more routine parts of the immigration laws, it is still very important that we not over-learn that lesson.

Perhaps the greatest risk of moving the immigration function to the Homeland Security Department is that we will lose sight of the positive side of immigration. I am particularly concerned about functions such as refugee resettlement which, as you know, Mr. Chairman, has suffered greatly and has been slowed down perhaps more than any other part of immigration admissions. This impact on refugee admissions is of particular concern to me.

The second point is that we should keep immigration services and enforcement closely linked. There has been wide agreement on some operational shift in all the reorganization plans I have seen to separate enforcement and services units in whatever new immigration agency is created, and that would enable some field office realignment that could carry a lot of benefits. I support that approach.

But throughout the spring, we saw a growing recognition—and it is certainly reflected in the Kennedy-Brownback bill—of the importance of maintaining tight coordination and linkages between those units. I think that your bill provided a much better structure than the House bill for making sure that this new system would function in a way that recognizes those linkages.

After the Homeland Security Department proposal was offered, many of those who worry about a deemphasis of services have revived the talk about a more rigid split, and you have seen some of that in the statements here today. I believe that would be a mistake. I do not think we should leave the services component back in the Justice Department or put it in some other location.

Although I certainly understand the impulse and the reasoning behind that, and I share that concern greatly about a deemphasis of services, leaving services in a different department would have the opposite effect from what is intended. I think it would result in a loss of clout, of effectiveness for that particular component, for the services component. It would be a small unit in the department, a kind of vestigial unit.

I think there are better ways to do that, to deal with that concern within the structure of the Homeland Security Department itself, although it is a close question. It is certainly an arguable call. The impulse is right. I think we have to be very careful about what the impact would be.

Immigration management, in my view, should be seen as a unified whole. It involves services, the positive side of immigration. It involves enforcement, and it really needs to be thought of as an immigration management function overall. The pieces should be kept together.

The third point is that immigration deserves ongoing, high-level attention. It has been getting that for the last decade or so in the Justice Department. It is a bit unfortunate from that point of view that it is now proposed to be moved to another department.

I outline a recommendation in my statement about how to best observe these principles—to provide for improved enforcement and

coordination with homeland security efforts, while still recognizing the positive side of immigration, the services and humanitarian component. That goes along very much with one of the themes in Senator Kennedy's opening statement; that is, to create a fifth division within the Homeland Security Department, to split the immigration function out away from border and transportation security and give it its own undersecretary.

Managing the movement of human beings is sufficiently distinct and important from the other tasks of that department to justify that kind of a change. I believe we would still retain most of the benefits of coordination with other units, with other protection functions that are sought to be obtained by creating a Homeland Security Department, because those units would also be within the same department.

But creating an undersecretary who focuses only on immigration would afford a great many benefits. That undersecretary will keep in mind the full richness of our immigration tradition, and I think by the very nature of the task, if that person is able to focus in that way, he or she will give priority to services. Then internally that unit can be structured in a way that would be very similar to the Kennedy-Brownback bill. It is quite important to use this occasion not just to move INS as it is, but to restructure.

Let me just mention briefly two further structural suggestions that I offer in the testimony. I think probably the visa function should be moved to this new department, although I don't fully understand exactly what is intended in the President's proposal and I would certainly like to look at what other options might be on that.

Finally, I think that the Executive Office for Immigration Review should probably go to the Homeland Security Department, although that is also a close question, and it would report to the undersecretary.

Some are pushing for EOIR to become an independent commission. I fully support the notion of the independence of the immigration judges and the Board of Immigration Appeals in making their own individual decisions. It is important to safeguard that. We can make some changes to further that end, but I do think that EOIR needs to be linked to the rest of the immigration function for managerial and logistical purposes.

Sometimes, we need to deploy immigration judges on a priority basis, for example, to respond to a sudden influx, and quick action can keep a minor situation from turning into a major crisis. For these kinds of managerial and logistical purposes, it is important to keep those units together, and I offer some further development in the testimony about how I think that can be done. I also deal there with some further questions such as the referral authority that now exists with the Attorney General.

Thank you very much.

[The prepared statement of Mr. Martin appears as a submission for the record.]

Chairman KENNEDY. Thank you very much.

Judge Keener?

STATEMENT OF DANA MARKS KEENER, PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, SAN FRANCISCO, CALIFORNIA

Judge KEENER. Mr. Chairman, members of the subcommittee, I thank you for the opportunity to testify.

First, I would like to convey the regrets of former Congressman Bill McCollum, who was unable to appear today, and place his testimony in the record. I am especially pleased to be able to do that because I agree with it. I would have done it in any event.

[The prepared statement of Mr. McCollum appears as a submission for the record.]

Judge KEENER. I am appearing on behalf of the National Association of Immigration Judges to provide you with our perspective of where the immigration courts should be located during these reorganization efforts.

I am the President of the Association, which is the certified representative of the approximately 228 immigration judges nationwide. In that capacity, the opinions I offer are the consensus of the members and they may or may not coincide with any official position taken by the Department of Justice.

In January of this year, the Association published a position paper advocating increased independence for the immigration courts. We are submitting that paper as part of today's written testimony for your full consideration. Now, I would like to highlight the major premise of that paper and bring our views current with the context of the Homeland Security Department and reorganization.

Our paper recommended the adoption of the 1997 proposal from the U.S. Commission on Immigration Reform that EOIR be located in an independent executive branch agency. This proposal is an exhaustively researched bipartisan plan which was the culmination of years of study involving all of the parties involved in immigration adjudications.

Creating an independent agency would satisfy our paramount concern of protecting America's most fundamental legal value—due process. This solution would strike an appropriate balance of powers in this extremely sensitive area. In addition, we believe independence could provide much needed oversight on various immigration-related functions and become a vehicle for increasing efficiency.

EOIR was created in 1983. Yet, the historical reasons for the separation of these functions from INS are even more compelling today. The immigration courts decide more than 260,000 matters annually. Thus, administrative efficiency is a practical necessity. However, the need for public confidence in the impartiality of the system is equally great.

When reduced to its simplest form, as witness Walker testified, any structure, be it the Department of Justice or Homeland Security, where the boss of the prosecutor is also the boss of the judge, is problematic. One does not need exotic legal training to find this a disturbing concept which creates, at the very minimum, the appearance of partiality.

Perhaps the most blatant example of the susceptibility to improper influence which is inherent in the current structure relates

to contempt authority. In 1996, Congress mandated contempt authority for immigration judges, but left the actual implementation to the Attorney General, who was required to promulgate regulations.

Over 6 years later, there are no regulations. Rather, it is opening acknowledged that this recalcitrance is due primarily to the objection of the INS, who doesn't want its attorney staff subjected to contempt provisions which are levied by other Department of Justice employees—the immigration judges.

The promulgation of contempt authority would provide the immigration court with an important tool to enforce INS compliance with its orders and would serve to assure that alleged terrorists obey orders closing immigration proceedings for national security reasons.

The Attorney General has issued new regulations for protective orders quite recently, but the current sanction of mandatory denial of discretionary relief is toothless, since these applicants are already statutorily barred from virtually all forms of relief. The prompt issuance of regulatory authority for contempt power could resolve this problem.

The separation of the immigration court from the agency which houses the INS will also aid Congress and the American people by providing an independent source of statistical information to assist in determining whether the INS mandate is being carried out in a fair, impartial, and efficient manner. It can provide much needed oversight on various immigration-related functions and become a vehicle for enhancing productivity.

Pursuant to DOJ policy, last year EOIR's director established case completion goals which set target times for the adjudication of various types of cases. Yet, many judges view the INS as an impediment rather than a facilitator to timely case completions.

For example, inordinate delays in INS processing times for visa petitions, INS forensic evaluations, overseas investigations, and the lack of prompt followup on FBI criminal record hits, are routine causes for the INS to request lengthy delays in proceedings. It is not uncommon for the INS to take a year or more to resolve such collateral issues. The lack of contempt powers hinders the ability of judges to require parties to meet timely deadlines to resolve these issues and to notify the court in advance so that we can safeguard precious docket time.

Frankly, neither the Select Commission nor the Association anticipated that any reorganization would culminate in the departure of the INS from the Department of Justice. Now, that seems to be the approach favored, at least by the White House and by Commissioner Ziglar.

But the Association would like to make its position perfectly clear. In the absence of an independent agency status, as recommended by the Commission, which remains our first choice, we believe that EOIR should remain at the Department of Justice.

If the INS is transferred to the newly created Department of Homeland Security, then an alternative where the immigration courts and EOIR structure remain in the Department of Justice could serve as an acceptable stop-gap solution. Such a move would

ensure some measure of judicial independence and would spare the expense of creating an independent agency.

The Association has provided proposed language as an appendix to our written submission which would clarify the independent nature of the immigration judge decisions wherever the immigration courts are structurally situated.

The optimal balance of efficiency, accountability, and impartiality would be achieved by adopting the Commission proposal of an independent executive branch agency. At a very minimum, this rationale, when modified to meet the current homeland security reorganization plan, would require maintenance of EOIR as an agency within the Department of Justice.

Establishment of an independent immigration court would achieve meaningful reform in the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, providing insulation from any political agenda. We strongly urge you to adopt this approach.

Thank you.

[The prepared statement of Judge Keener appears as a submission for the record.]

Chairman KENNEDY. Thank you very much.

Let's do 10-minute rounds.

Part of the dilemma that many of us have in terms of where these enforcement and service functions ought to go concerns the present situation in the Justice Department. Over the recent years we have seen a tripling of the resources for the enforcement side, while the services side receives less support and remains more dependent on fees. So even now services are the step-child.

If the service function goes to Homeland Security, what is going to happen to those people who are looking for asylum? Are the Immigration officials going to be looking at asylum seekers through the lens of someone who is going to be primarily concerned with terrorism or looking at them through the real definition of asylum?

I ask you to help us think through this dilemma, Professor Martin, as well as the others on the panel as we grapple with this issue. We were faced the other day with a decision by the Department to fingerprint immigrants that were coming from certain countries. Then we had the announcement of job fairs for people from the same countries.

So here we are examining people with visas who come in. We are making the decision that they can come in. We are fingerprinting them uniquely because they come from certain countries, and then we are trying to recruit them in the afternoon at job fairs to help us out. Talk about sending mixed messages.

How are we going to try and avoid this situation? Can we do it? You are the people who have studied and watched this issue over the period of time, and have monitored trends, seen when solutions have been working, perhaps, and when they haven't.

We were looking at reorganization with Professor Martin about 5 years ago at the time of the Jordan Commission and since then we have seen changes. How can you help us get the solution right this time?

Mr. MARTIN. Well, if I could start with that one, to some extent unfortunately mixed messages are going to be inevitably part of

this business because we do have mixed feelings as a society about immigration. We value it, but we fear it. At different times, depending on the economy, depending on perceived national security threats, we will take a different view.

I think it is possible to structure it, though, so that we can even out some of those differences. But a lot of it will depend, of course, on the individual who happens to be in charge. That is part of why I favor placing the immigration function, assuming it goes to Homeland Security, at the level of undersecretary and give it that kind of prominence, someone who will inevitably have to deal day by day with the services side, the humanitarian side, as well as the enforcement side.

Beyond that, on the services side, you are quite right. Part of the problem comes from the way services are funded through fees. The problem that we had sometimes when I was at INS was that it took a long time to do a study of fees, to justify it, to face down perhaps some possible litigation, and to justify the exact level at which the fees were set. By the time you get through that whole process, it could be obsolete; it is not completely funding what is needed.

So I think we are probably looking at a situation where I think a minor change in that funding formula could allow for us to get out in front of that or allow for a constant cost of living increase.

The main issue is how to structure the new department in a way that we don't focus only on the negative side, the fear side, the enforcement side. Among the options available to us right now—none is perfect, but I think the odds are best with an undersecretary for immigration affairs in Homeland Security.

Chairman KENNEDY. Let's get into that issue later on. We hope you will give us your ideas on the fees and how to correct that problem then.

Professor Hing and Ms. Walker, if you could comment on that.

Mr. HING. Mr. Chairman, thank you. Let's not underestimate what is available technologically today. The Immigration Service has—this may come as a surprise for me to say this, but has some very good people, some very well-meaning people that do not have the resources available that they need.

A couple of years ago, I was actually retained by a Silicon Valley startup to negotiate with the Immigration Service over electronic filing possibilities of applications, and the Immigration Service was completely and totally blown away by what is available, what has been available, and what is not available to them.

The reason I point that out is because I actually think that the type of technology that we need to provide the kind of screening that we all want of every non-immigrant and immigrant who enters the United States can be implemented. And if that is so, I do not believe that you need to have a Department of Homeland Security to implement that kind of screening.

You do need their input on how to feed that information in or where to gather it and that type of stuff, but it can be readily available on an electronic look-out apparatus, and then we can all be happy. We can screen everyone, and the businesses that want to recruit these individuals do not have to be slowed up and those parts of the country that want to recruit immigrants can go ahead

with the recruitment and those others that are having backlashes can take slower paces.

I just don't think that we should be afraid of going forward with security issues at a cost of legal immigration. They can be done simultaneously.

Chairman KENNEDY. Well, I couldn't agree with you more. We tried to do it but the CIA would never be willing to share that information with the INS. We tried to remedy that situation with our Border Security Act, focusing on a whole range of technology and redundancy within those systems, including using biometric devices and collecting information into the INS of passenger lists at ports of entry.

We have a very elaborate system, but we have to look at it more broadly.

If we are looking at immigration as enforcement and also services, it is enormously important, for the reasons all of you have testified, to see that the piece of this arrangement that gets short shrift is the services and the protection of people, whether unaccompanied children or asylum seekers or others.

Ms. Walker?

Ms. WALKER. Thank you, Chairman Kennedy. Just briefly to reiterate what Professor Martin indicated, having somebody up at the top with strength, showing the importance of the immigration issue itself, is important.

In addition to that, I think we are forgetting, again, the two sides of the coin, adjudications and enforcement. The two complement one another. I want better adjudications, providing a security element, as well. The problem is implementation.

I am sure that you all have read about the IBIS checks that were being conducted on the filing of petitions, and in New York they were turning away applicants. It turns out that INS didn't realize they didn't have people onsite trained in the ability to run those checks, nor did they have the facility to do it necessarily, and they had to send in basically a SWAT team to get it up and running. That is just regarding those checks.

And something even more simplistic: let's talk about being able to take money and facilitate travel. Have you ever waited 2 hours for the clerk to get back from lunch to pay your $6 to be able to have somebody enter the United States? It is that fundamental an issue.

If we are talking about technology, I spent 2 days at the General Accounting Office study about biometrics, and then they came down to El Paso last week to listen to how biometrics might work or not work on the border. We don't have the capacity yet to be able to effectively scan our laser visas.

So great goals, but we have got to be able to figure out how we are really going to implement them and how we are really going to improve security overall. That is the task.

Chairman KENNEDY. I just have a few seconds left. Judge Keener, just speaking for yourself, what proposal do you think would be best, creating an independent court system or keeping the immigration court system at Justice?

Judge KEENER. Our top choice is the Commission's recommendation because of the fact that we believe that was a study that was

very thorough and done in cooler times when there were less emotional concerns. We believe that an independent agency is justified because of the stature of the kinds of cases we have to hear. They are death penalty cases. If an immigration judge makes a wrong call on somebody's asylum application, we have sentenced that person potentially to death.

We think it is appropriate to remain as an administrative agency so that the proper checks and balances are there, but we think an independent agency is the best choice.

Chairman KENNEDY. Senator Brownback?

Senator BROWNBACK. Thank you, Mr. Chairman.

I want to thank all the panelists for their very clear testimony. It was excellent and very clear. I want to get some summary thoughts, if I can, to make sure I get it all clear from you.

Professor Martin, both you and Ms. Walker support the move to the Homeland Security Agency of the INS service, in total, but the creation of a fifth branch within Homeland Security. I want to make sure I am correct with that with your testimony.

Mr. MARTIN. If I could just clarify, my preference really would be for the function to remain at the Justice Department, but I think that is unrealistic in the present climate, and I do think it is important to keep the function together. So if pieces are moving to Homeland Security, which I think is inevitable, it is better to have the entire function there in a fifth unit.

Senator BROWNBACK. So let's pursue that line, if I could, for just a second. I think if people envision a Homeland Security Agency, they certainly see border security as being a part of that. You think it would be a worse situation to separate out border security and the services than to move border security, say, to the Homeland Security Agency but not move the services, leaving the services at the Justice Department. Is that correct?

Mr. MARTIN. Yes, that is my judgment. I think it is most important to keep it together because it is really not two separate functions, services and enforcement. They are closely linked, as Ms. Walker said. It is an overall picture of immigration management and it works best if it is done together. I think we can best serve all the values that are talked about by keeping that unified.

Senator BROWNBACK. This has been a topic you have talked about, thought about, and visited with a number of people for a long period of time as this topic of reorganization of INS has been going around. This isn't something that has just been forced upon you to confront as a topic within the last few months.

Mr. MARTIN. That is right.

Senator BROWNBACK. Ms. Walker, as a practitioner, you believe this should be moved to Homeland Security, but created in a fifth division within Homeland Security?

Ms. WALKER. I think I can reiterate what Professor Martin is saying that if it is going to be moved, it needs to be moved together. A practical example is when we talk about border security, the issue of Border Patrol is typically what we think about, and then we also include inspections.

Inspections involves determination of asylum benefits, determination of final legal permanent resident status, how long you admit people to remain in the United States. A lot of our tourism

and commerce is tied to facilitation of that entry, and how do we dump that into an enforcement context alone? I think it is risky business to not recognize the fact that that is an adjudication, a benefit issue.

Senator BROWNBACK. So they need to stay together, the benefit and the enforcement functions. I agree that these seem to be very closely tied. Again, they are very different functions, really, but they do need to be tied together.

Ms. WALKER. And it works on the flip side as well. I have an enforcement element in adjudications and in enforcement an adjudications element. I want the two to be important and I want to facilitate them and try to make them be successful from a national security perspective. They are like either side of a coin, as we have been discussing earlier.

Senator BROWNBACK. Neither of you would want the move to take place absent a restructuring of the INS, as has been discussed in front of this committee before. Is that correct, Ms. Walker?

Ms. WALKER. Yes, sir. If we are going to put something dysfunctional into something we are trying to make effective, it doesn't seem to be the best route.

Senator BROWNBACK. Professor?

Mr. MARTIN. I do think we should use this occasion for restructuring, partly because it has been around for so long. We should have a pretty good idea of the overall new structure and really get people busy implementing it, instead of just moving a function, unreformed, to Homeland Security and then starting up the debate all over again.

We are pretty close, I think, between your bill and the action the House recently took. The general outlines are pretty similar. It is really time to get moving on that, and it would do a lot for morale and it would do a lot for enabling us to move on to the kinds of micro improvements that I think are perhaps more important than reorganization, as Professor Hing was talking about, if we can settle the restructuring framework and begin the detailed process. It will take several years of really putting that in place. That will help the entire function enormously.

Senator BROWNBACK. I want to add here I think we have got a lot of very qualified people that work within the INS. I think systems matter greatly, and if you put good people in a bad system, bad things can and still do happen. That is why systems are important, that you get your systems right, and that is why I think this is an important topic.

Professor Hing, you don't think this should be moved at all, and I respect your opinion on that and I think I pretty well understand the reasons why you are articulating that. Without looking at that topic, can you remove yourself from that point and ask what is it we should be changing within the function if it is moved? Do you move the whole thing or not?

I recognize I am asking you to give an opinion on something you disagree with, but I would like to try to extract that from you, if I could.

Mr. HING. Actually, I do address that in the written testimony. Thanks for the opportunity to respond to what you are positing.

To me, the best way of looking at this is to look at specific examples of typical kinds of immigration cases, and I am not going to walk you through many of them, but I will give you a couple of examples. I encourage your staff to do this, to look at typical types of immigration cases.

How often does a national security or even an enforcement issue come up in a typical non-immigrant case, an adjustment of status case, a naturalization case, a refugee case? Hardly ever.

Senator BROWNBACK. It is a legitimate point that you make.

Mr. HING. What happens is the only sort of security issue or enforcement issue that comes up is with respect to whether or not the person has a past criminal background, and that is done by FBI fingerprint checking and Interpol checking. That, I hope, can be improved. It is already not that bad, but it would be done even better.

So that is why, in my view, if you are going to move most of INS to the new department, I would not move the service function over because they can be disconnected. It is not that complicated to disconnect them. I disagree, with respect, with the colleagues on both sides of me. They are not that connected, they can be separated. Walk through typical examples; it is not that hard.

The truth is that if there is a separate service entity—it existed before historically when it was in the Department of Labor. You know, we are going way back now and that kind of thing, but there was a time when immigration was processed in a separate department and everything was fine. In the early 1900's, many, many more people came in than come in today, and it was handled quite fine. I am afraid of the atmosphere that is going to take over at the Department of Homeland Security.

Senator BROWNBACK. I think that is actually the concern of both of your colleagues. They think it would be probably better if you kept it together. But your opinion would be, if you are going to move something, move border security, but not the services function. So you would bifurcate, you would separate those issues out.

Mr. HING. That is right, that is exactly right.

Senator BROWNBACK. And you say that as a practitioner and just a very pragmatic example of——

Mr. HING. Exactly. I have been at the border many times. I was just there 2 weeks ago on an inspection. I continue to do that. I have written in opposition to Operation Gatekeeper, quite honestly, and I know what is happening at the border. But I know what needs to happen, and it has a lot to do with security.

Senator BROWNBACK. Ms. Walker, you are a practitioner as well and you come to a different conclusion on this very point as a practitioner. Why do you come to a different conclusion on that point?

Ms. WALKER. Reasonable minds can differ, but the reason mine differs in this circumstance is I am at the border for 16 years. That has got to mean something, and we also deal a lot with the consulates in Mexico and the coordination of those activities.

I know that right now, even without the emphasis on enforcement as much, the inspectors at our ports of entry have more of a bend to be enforcement-minded than anything else.

On a regular basis, I am having to deal with problems regarding inspections because inspectors are not following the law or inspec-

tors are abusing someone based on their nationality or inspectors can't figure out that somebody is a U.S. citizen, so they assume to the contrary because we don't document our U.S. citizens. I think it is very important that you keep the two together to coordinate them, period.

Senator BROWNBACK. One final quick point, if I could ask this, on the visa area there is a dispute here as well about where that function should be handled. Some of you support leaving it at the State Department and others of you would support pulling it out.

Professor Martin, you must have wrestled with this issue when you were in INS. Why do you come down the way you do on this?

Mr. MARTIN. Well, I think that is a close call and I do not think that is an area that had been a major problem. If there were not a very large-scale reorganization already on the table, I don't think I would be supporting that. I would like to look more closely at what the various options are.

But I am inclined to think that it makes more sense, given the large-scale reorganization we are doing and given the need for consular officers to be applying the same standards, the same understanding of the laws and regulations, as the inspectors at the border, that it makes sense to look closely at least at putting those two functions together.

Senator BROWNBACK. I think it is a big issue because you look at September 11 and many people look at that and say if we had caught this earlier, we wouldn't have had this problem. It is a close call.

I want to thank the panel. I think it was an excellent discussion. Judge Keener, I don't have questions for you because I understand clearly where you are coming from on the issue and you have articulated that here.

Mr. Chairman, I want to ask unanimous consent to submit Senator Hatch's statement for the record, if I could.

Chairman KENNEDY. We will have it printed.

Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Mr. Chairman. While I have been listening to this, I have also been reading some very interesting material and I just wanted to share it with people.

A few years ago, a study was done by the Center for Immigration Studies of 48 individuals, all of whom have either been convicted or pled guilty to terrorist attacks in this country. Eleven were either convicted or admitted plotting New York landmark attacks, two New York subway attacks. Four were convicted of the African embassy bombings; 7 of the first World Trade Center bombing; 20, including Zacarias Moussaoui, of 9/11, and Moussaoui has not been convicted, obviously; 3 of the Millennium plot; and 1 of the murder of CIA employees.

It is very interesting what that study found, because it covers the immigration area. Now, these are all people that are guilty of terrorism or planning terrorism. Twenty-six had no prior violation of immigration law. Sixteen of them, or one-third of the 48 terrorists, were on temporary visas, primarily tourist visas. Seventeen of the 48 were lawful permanent residents or naturalized U.S. citizens. Twelve, or one-fourth, were illegal aliens, and 3 of the 48 had applications for asylum pending.

Now, I say this to really show that this group of 48 convicted or admitted terrorists sort of spans the immigration spectrum. The two terrorists, Sheik Rahman and Ali Mohammed, who were terrorists involved in the 1993 World Trade Center incident, were on the terrorist watch list, but they still got visas. That is one of the reasons I think the visa aspect has to go into this new agency for sure.

The case of Khalid al Midhar, who may have piloted American Airlines flight 77 into the Pentagon, shows why information-sharing must be improved. Most reports indicate that in January 2001, while he was out of the country, the CIA actually had information that al Midhar was involved in the attack on the U.S.S. Cole. However, his name was not put on the watch list until August of 2001, and that was a month after he already reentered the United States.

Three September 11 terrorists were never interviewed by the American consulate. According to my sources, Abdulaziz Alomari, Salem al Hamzi, and Khalid al Midhar obtained their visas using a system called Visa Express, which is used by the American consulate in Saudi Arabia to speed up the visa application process. They were never interviewed.

I think one way of looking at this is to look back at people who have violated our system who are actually the guilty ones. So far, in the United States, 48 people have either been convicted or admitted participating in terrorist plots.

If you look at the list—and I would like to, if I might, Mr. Chairman, put into the record a chart which contains the names of each and their immigration status.

Chairman KENNEDY. Without objection, so ordered.

[The information referred to appears as a submission for the record.]

Senator FEINSTEIN. It really indicates why Governor Ridge has moved to involve such disparate and wide areas of INS into this new agency. Particularly in the subway attacks and the first World Trade Center, they were illegal aliens, but the African embassy bombings were naturalized United States citizens.

The New York landmark plots were all permanent residents, and the Millennium plot was all illegal aliens. On 9/11, three were illegal and the rest on tourist visas, and one on a business visa. You have three who were asylum applicants, the one on the murder of the CIA employee, the first attack on the Trade Center, and in the plot to bomb New York landmarks.

So in terms of looking back at where the problems are, they are clearly spread across the board, and that may well be why Governor Ridge chose to go for the whole list, including naturalization, which I think most of us would admit is a service-oriented portion of INS.

I was wondering if any of you have any comments on that.

Please go ahead.

Ms. WALKER. Thank you very much, Senator Feinstein. I can certainly understand what that report would be extremely disturbing, and what I would like to at least respond to is two points.

One, a personal interview does not change whether or not one conducts a check of the data base. There are also mail-in proce-

dures at consular posts. Let's face it: a lot of our adjudications by the Immigration Service are done without a personal interview.

Senator FEINSTEIN. Except they checked the data base, because I asked them in another hearing, and there was no information.

Ms. WALKER. When the data base does not contain the pertinent information, obviously the data base is going to be useless. Depending upon when the check is done, the visa application can be made years before I decide to travel to the United States. Many visitor visas may have a longevity of 10 years and I may choose to have my first travel to the United States 3 years later.

My second line of defense at that point in time is the Immigration Service, and when I am admitted for entry, as long as I am not a visa waiver participant, I have had to go through and get that visa in the past. And when I am admitted, I am supposed to be going through a check. It is not done a hundred percent of the time.

For that matter, at land ports of entry it is not done a hundred percent of the time. I recognize that. We trying to improve the check process and the data base access. But I don't think it is necessarily tied to the lack of a personal interview. I also think that it may be tied to the timing of the entry of the individual after visa issuance.

Senator FEINSTEIN. Thank you.

Yes, Mr. Martin.

Mr. MARTIN. I would like to just offer a couple of thoughts on that. First of all, of course, it is extremely valuable to look at past experience of the kind that you recite there to figure out how to improve our systems in the future.

The episode with Sheik Rahman got a lot of attention, and it was primarily the State Department and I was not involved in that, but they made a number of changes in their procedures to make surer that information in the system would definitely be used at a time of making decisions on visa issuance like that.

Senator FEINSTEIN. Right.

Mr. MARTIN. You mentioned 26, if I have it right, that had no prior violations. That indicates an inevitable limitation on this screening process. Without prior violations or other kinds of intelligence information, the most diligent consular officer, and usually even with an interview, is not going to discover that kind of problem.

Just to put it in perspective, I think we have to realize that immigration controls are an important part of our defense against terrorism, but they are a more limited part. Much more important are going to be the efforts to develop the intelligence and then make sure we share it, rather than trying to multiply occasions in which we interview people.

The only way to be really sure no threats come from outside is completely to close our borders. That obviously is not in the cards. We have to make tradeoffs and make risk assessments all the time, so some part of the very large volume of traffic that comes in will come in without a detailed interview. I think we will continue with that, but we can do better in applying the information we have and in developing better information for the future.

Senator FEINSTEIN. One of the real problems is in the visa waiver program, which I think has about 27 countries in it and takes in 23 million visitors a year, they have 100,000 passports that have been stolen. I have read where at least two of the hijackers may well have used a passport that they got from the visa waiver program. So everything is kind of up to be looked at very carefully.

I appreciate your comments.

Chairman KENNEDY. Well, I want to thank you all. It has been very helpful to hear from you. We have to move along on this issue and it is a long process to try and get this right. It is going to be challenging, so we are going to be talking to you frequently in the upcoming weeks. All of you have a wealth of experience and we thank you very much.

We will adjourn the hearing.

[Whereupon, at 3:33 p.m., the subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in Committee files.]

SUBMISSIONS FOR THE RECORD

American Civil Liberties Union
Testimony on the President's Proposal for a Homeland Security Department:
"The Homeland Security Act of 2002"
Before the Immigration Subcommittee
Of the Senate Judiciary Committee
Submitted by Timothy H. Edgar, Legislative Counsel
June 26, 2002

On behalf of the American Civil Liberties Union (ACLU) and its approximately 300,000 members, we welcome this opportunity to provide this testimony for the record on the President's proposed legislation to create a Department of Homeland Security, the Homeland Security Act of 2002 ("HSA"). We commend you for examining these issues in today's hearing.

The ACLU is a non-partisan, non-profit organization dedicated to preserving civil liberties and the principles of our constitutional democracy, including open and accountable government.

The proposed Department of Homeland Security will be a massive Cabinet-level department, containing over 170,000 employees and twenty-two federal agencies.[1] It will have substantial powers, and will include more armed federal agents with arrest power than any other agency. In considering the proposed Department, Congress should ask itself not only whether the proposal represents sound public management, but also whether the Department will have structural and legal safeguards in place that are sufficient to keep the agency open and accountable to the public.

Unfortunately, the draft legislation not only fails to provide such safeguards, it eviscerates many of the safeguards that are available throughout the government and have worked well to safeguard the public interest. As proposed, the plan:

- **Hobbles FOIA** – Any information voluntarily submitted to the department about terrorist threats to the nation's infrastructure are exempt from Freedom of Information Act disclosure, drastically limiting the agency's responsibility to answer public questions about how well it is addressing these threats. (HSA § 204).

- **Limits citizen input** – Advisory committees to the department, which normally include citizen input, hold open meetings and must be balanced in viewpoint would be immune from these safeguards of the Federal Advisory Committee Act, further undercutting the agency's accountability to the public. (HSA § 731).

- **Muzzles whistleblowers** – Employees of the new agency could be stripped of the protections contained in the federal Whistleblower Protection Act. This would eliminate guarantees that -- were the agency to overreach its mandate or

[1] *See* Bob Williams & David Nather, *Homeland Security Debate: Balancing Swift and Sure*, CQ Weekly, June 22, 2002 at 1642.

engage in questionable activities – such abuse would be disclosed and the agency held accountable to Congress and the American public. Protection for the bravery like that displayed by FBI Agent Coleen Rowley would not exist in the new agency. (HSA § 731).

- **Lacks strong oversight** – Given the enormous potential power of the proposed agency, its Inspector General must not be hampered like those in other federal law enforcement agencies. Currently, the cabinet secretary in charge would have veto power over the IG's audits and investigations. (HSA § 710).

- **Threatens personal privacy and constitutional freedoms** – Many of the information sharing provisions in the HSA are vague and do not provide sufficient guarantees to protect privacy or constitutional freedoms.

Finally, we firmly reject proposals to include in the Department of Homeland Security the intelligence gathering functions of the Central Intelligence Agency (CIA), other foreign intelligence agencies, or the Federal Bureau of Investigation (FBI). Intelligence gathering operations abroad are, as a practical matter, largely immune from constitutional constraints. The CIA and other agencies that gather foreign intelligence abroad operate in a largely lawless environment. To bring these agencies into the same organization as the FBI risks further damage to Americans' civil liberties. As a result, Congress should resist any attempt to endow the Department of Homeland Security with new intelligence gathering powers or to fold the FBI and CIA into the new agency. Instead, Congress should put in place clear limits to prevent the Department from permanently retaining files on Americans that relate to First Amendment activities and have no connection to any criminal activity.

I. The Homeland Security Department Must Be Open and Accountable

The President's plan does not contain sufficient structural guarantees to ensure that this vast new Department will be accountable to the public, both to ensure it is doing its job and to ensure against abuse. Instead, the plan eviscerates many of the existing safeguards for government agencies. These provisions should be eliminated, and a strong mechanism should be put in place to ensure against abuse.

Freedom of Information Act (FOIA) Exemption

The ACLU strongly opposes section 204 of the proposed legislation, which creates a broad new exemption to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Section 204 provides that information that companies or others voluntarily provide to the Department about "infrastructure vulnerabilities" and other information said to be relevant to terrorism will be exempt from FOIA. These terms are not defined by the proposed legislation and could potentially cover a host of information. This is a deeply misguided proposal, and it should be rejected.

The FOIA is the bedrock statute designed to preserve openness and accountability in government and new exemptions to its provisions should not be created lightly. As the Supreme Court has made clear, "Disclosure, not secrecy, is the dominant objective of the Act."[2] Open government is a core American value. It should not be set aside for reasons other than genuine necessity.

The FOIA already contains a number of common sense exemptions that would cover critical infrastructure information the disclosure of which could result in harm. The FOIA does not require the disclosure of national security information (exemption 1), sensitive law enforcement information (exemption 7), or confidential business information (exemption 4).

Courts have carefully weighed the public's need for disclosure against the possible harms of disclosure under FOIA's traditional exemptions. In deciding whether to disclose technical information voluntarily submitted by private industry, courts have given substantial – many in the public interest and FOIA requester community would say excessive – deference to industry demands for confidentiality of business information under exemption 4.

Generally, information that a business voluntarily submits to the government on the basis that it be kept confidential is already exempt from disclosure if the company does not customarily release such information to the public and preserving confidentiality is necessary to ensure that the government will continue to receive industry's cooperation. *See, e.g., Critical Mass Energy Project* v. *Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). It is difficult to see how any truly sensitive business information that was voluntarily submitted by a company concerning the vulnerabilities of its critical infrastructure could be released under this standard.

Indeed, supporters of a new FOIA exemption for critical infrastructure information have, when pressed, been forthright in admitting that such legislation simply is not needed to protect sensitive information from disclosure. For example,

- Senator Bennett, chief sponsor of legislation creating a new critical infrastructure exemption, has admitted that "[t]he Freedom of Information Act itself" currently allows sensitive information to be protected. "That is, there are provisions in the Act that say information need not be shared" with the public.[3]

- John S. Tritak, Director of the Critical Infrastructure Assurance Office of the U.S. Chamber of Commerce, says "You could say that [in the] current environment, if you're very careful and you watch out, the old existing exemptions will cover any concerns that may arise under FOIA, not to worry."[4]

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[2] *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).
[3] *Senate Governmental Affairs Committee Holds Hearing on Private and Public Information Sharing and Infrastructure Security* (FDCH Transcripts), May 8, 2002.
[4] *Id.*

- Ronald L. Dick, Director of the National Infrastructure Protection Center of the Federal Bureau of Investigation (FBI), has said "[M]any legal authorities have agreed that the federal government has the ability to protect information from mandatory disclosure under the current statutory framework."[5]

- VeriSign public policy director Michael Aisenberg has said worries about disclosure were overblown because FOIA already protects sensitive information, and new legislation is simply not needed "substantively."[6]

Rather than put forward evidence that some information about critical infrastructure exists that is not adequately protected, supporters of a new exemption have said "it doesn't matter" whether current law provides adequate protection. Rather, it is said, a new exemption is needed because of a "perception" in private industry that there is some risk, however remote, that information that is voluntarily submitted to the government might be at risk of disclosure under FOIA.

If industry is unwilling to provide information to the government, despite adequate legal protection, the solution is not to change the law but to change the misperception by issuing legal guidance making clear the parameters of the FOIA as it currently exists. If a misperception exists that truly sensitive information that is given to the government cannot be protected from disclosure, it is hard to see how that will change if another exemption is enacted.

Perhaps most importantly, creating an overbroad exemption for "critical infrastructure information" would undermine, rather than enhance, security. Such an exemption would permit private industry and the government to shield from the public the actions they are taking - and, more importantly, the actions they are not taking - to protect the public from attacks on critical infrastructures.

Secrecy can hinder anti-terrorism efforts. Earlier this year in Israel, the media obtained a government report that discussed the potential vulnerability of a fuel depot to terrorists – exactly the sort of information about "infrastructure vulnerabilities" that might be exempt from FOIA under the proposed legislation. Military censors blocked publication of the report, and persuaded the mayor of Tel Aviv not to go public with a campaign to fix the problem. Nothing was done. Terrorists then attacked the fuel depot. In that case, public debate might well have forced action to address the problem.[7] The United States should not make the same mistake.

For the all of the above reasons, ACLU opposes the enactment of a new FOIA exemption for critical infrastructure information. At the very least, however, any new exemption that Congress enacts should be subject to the following responsible limits:

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[5] *Id.*
[6] *Washington Internet Daily*, April 18, 2002
[7] *See* Aviv Lavie, *Media: Sensing the Censor*, Ha'aretz (Tel Aviv, Israel), May 29, 2002.

First, any new exemption must be limited to clearly marked cyber-security documents, i.e., reports that describe cyber-attacks on a company's computer systems that have resulted or could result in some harm to its critical infrastructure. It should not apply to information about *all* vulnerabilities in critical infrastructure. Proposals to exempt information that is voluntarily shared with the government were developed to deal with the discrete and relatively new problem of cyber-attacks. To expand the scope of information that is exempted to include information about vulnerabilities to traditional physical attacks would interfere with a host of environmental and public safety regulatory regimes that have been developed over decades.

Second, any new exemption must be for written documents only, not "information" of all sorts. It would be virtually impossible to determine if information possessed by the government was the result of some oral conversation with a private sector company, making a FOIA exemption that covered such information unworkable and potentially devastating to the public's right to know.

Third, any new exemption must be limited in time, and should last for months, not years. A company which controls infrastructure that is vital to the public must have an incentive not only to share information, but also to do something to make itself less vulnerable to such attacks. A time limited exemption will give responsible companies and government agencies an incentive to fix their problem with due speed. Without a time limit, companies and the government can simply sit on the problem without any pressure to act.

Fourth, a new exemption should be an alternative to existing FOIA protections, not a new club to wield against FOIA requesters. Companies that wish to take advantage of the new exemption should clearly state on the relevant document they are requesting confidentiality under that exemption. Companies that fail to fix their vulnerabilities within a reasonable time limit, even with the protection of the new exemption, should not be allowed to take advantage of FOIA's other potentially applicable exemptions to cover up their failure to act after that time limit has expired. If companies believe the information they desire to share is protected under another FOIA exemption, they should be required instead to rely on that other exemption at the time of submission.

Finally, strict reporting requirements and a sunset clause should be included in the legislation to determine whether the new regime is working.

Federal Advisory Committee Act (FACA) Exemption

Section 731 of the HSA provides that advisory committees established by the Secretary of the Department of Homeland Security are exempt from the Federal Advisory Committee Act (FACA), and that members of such advisory committees are not subject to certain restrictions on federal employees' conduct.

The FACA was passed in 1972 to promote the values of openness, accountability, and balance of viewpoints, and to ensure administrative efficiency and cost reduction. FACA

imposes requirements on agencies[8] when they establish or utilize any advisory committee, which is defined as a group of individuals, including at least one non-federal employee, which provides collective advice or recommendations to the agency. 5 U.S.C. App. II, § 3(2). When an agency seeks to obtain such advice or recommendations, it must ensure the advisory committee is "in the public interest," *id.* at § 9(2), is "fairly balanced in terms of points of view represented and the function to be performed," *id.* at § 5(b)(2), and does not contain members with inappropriate special interests. *Id.* at § 5(b)(3). If these criteria are satisfied, the agency must file a charter for the committee. *Id.* at § 9(c).

Once an advisory committee is operating, the agency also must comply with requirements designed to ensure public access and participation. FACA requires an agency to provide adequate public notice that it is establishing an advisory committee, *id.* at § 9(a)(2), conduct open meetings, *id.* at § 10(a), keep minutes of those meetings, *id.* at § 10(c), make available for public inspection and purchase all documents prepared for or by advisory committees, *id.* at §§ 10(b), 11(a), and permit all interested persons to attend, appear before, or file statements with any advisory committee. *Id.* at 10(a)(3). These openness requirements ensure public monitoring of advisory committees and reduce the likelihood that advisory committees can serve as secretive channels for special-interest access to government agencies. FACA's right of access to advisory committee records is subject to the same nine exemptions that apply to access to agency records under the FOIA, which we believe are sufficient to guard against any disclosure of truly sensitive information.

By exempting from FACA requirements *any* advisory committees established by the Secretary of the Department of Homeland Security, the HSA severely undermines the openness and public-access goals of FACA. Although the HSA provides that the Secretary shall publish notice in the Federal Registrar announcing the establishment of an advisory committee and identifying its purpose and membership, the meetings will not be open to the public, formal minutes of committee activity during those meetings will not be kept, and the public will not have access to view or purchase documents prepared for or by those advisory committees. Public access to and participation in advisory committees are essential to guarding against special-interest access to advisory committees and influence upon government decision-making.

In addition, the HSA exempts members of advisory committees established under the Department of Homeland Security from federal laws restricting federal employees and officers (including members of advisory committees) from participating in or advising the government upon matters about which there exists a conflict of interest. *See* 18 U.S.C. §§ 203, 205, 207. Combined with the lack of public access to and participation in advisory committee proceedings, exemption from these laws threatens to erode FACA's requirement that advisory committees' memberships reflect a balance of viewpoints, and undermines the goal of accountability.

Waiver of Whistleblower Protection Act (WPA) and other Title 5 Protections

[8] The FACA does not apply to the CIA or the Federal Reserve System. 5 U.S.C. App. II § 4(b).

The federal Whistleblower Protection Act (WPA) was enacted to ensure that federal employees[9] who believe that a violation of law, mismanagement or other abuse has occurred may come forward and disclose that information without fear of summary dismissal or punitive action. The WPA protects federal employees from adverse action on the basis of a disclosure of information if the employee "reasonably believes [the information] evidences a violation of any law, rule, or regulation or gross mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health and safety." 5 U.S.C. § 2302(b)(8). An employee is not protected if the disclosure involves classified information or if the disclosure is specifically prohibited by law. *Id.* The Act contains administrative remedies, administered by the Merit System Protections Board, and an employee may also seek judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 1221, 7703(b). In this way, the WPA guarantees that federal agencies are held accountable to the American public if they overreach their mandate or engage in questionable activities.

The HSA permits the Secretary to sweep away the Whistleblower Protection Act, and all other protections for federal employees under Title 5, for the purpose of establishing a "Human Resources Management System" (HSA § 730) that is "flexible, contemporary, and grounded in the public employment principles of merit and fitness." By allowing the Secretary to make these personnel rules "[n]otwithstanding any other provision of this title," i.e., Title 5, the HSA does not guarantee employees of the Department of Homeland Security the protections of the WPA. Without such protection, employees who are in the best position to spot problems, violations of the law or dangers to the public are effectively silenced.

The Homeland Security Department's Inspector General May Lack Authority

We are concerned that the Homeland Security Act does not adequately provide for a fully functioning Inspector General (IG). Section 103(b) provides for the creation of an Inspector General pursuant to the Inspector General Act of 1978. However, section 710 of the HSA gives the Secretary of Homeland Security authority to override Inspector General Investigations in several areas including: (1) intelligence, counterintelligence, or counter terrorism matters; (2) ongoing criminal investigations or proceedings; (3) undercover operations; (4) the identity of confidential sources, including protected witnesses; (5) matters that constitute a threat to persons or property protected by the United States Secret Service and (6) other matters that constitute a serious threat to national security. Given the mission of the Homeland Security Agency, it is conceivable that many of the functions performed by this new agency could be said to fall under one of these exempted categories.

[9] The WPA does not apply to the CIA, FBI, Defense Intelligence Agency (DIA), the National Imagery and Mapping Agency (NIMA), the National Security Agency (NSA), and, "as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." 5 U.S.C. 2302(a)(2)(C)(ii). However, employees of the FBI are covered by similar whistleblower protections contained at 5 U.S.C. § 2303, but must make their disclosures to an official designated by the Attorney General.

Other agencies have similar provisions that require the inspector general to be under the direct authority of the Department Secretary (e.g. Treasury, Department of Justice, Postal Service) when the IG is investigating areas of national security. We understand the need to protect information that if released could pose a danger to national security. However, many of the agencies that are going to become a part of the new Homeland Security Act such as FEMA, the INS, the Animal and Plant Health Inspection Service of the Department of Agriculture and the Coast Guard have functions much broader than dealing with national security. We are concerned that transferring these agencies into a Department whose primary function is to protect the United States against terrorism could erroneously be perceived as elevating their regular duties to those of national security, thereby making such currently non-exempt activities exempt from Inspector General oversight.

We recommend further study of this issue before legislation is approved, regular oversight by Congress and a requirement for the Homeland Security Department to report to Congress concerning how often the Inspector General is prevented from performing its duties due to section 710 exemptions, and the standards by which the Secretary exercises such authority.

II. The Homeland Security Department Should Not Invade the Privacy or Constitutional Rights of Americans

Finally, the creation of a new Homeland Security Department naturally leads to concerns that such a large government agency could abuse its authority by invading the privacy or freedoms that Americans hold dear. Common sense protections can ensure against such abuses.

Because a primary function of the new Department is to receive and analyze information, Congress should insist on appropriate safeguards to protect the privacy of the information and to make sure that it is not used inappropriately. For example, there should be procedures to limit the use and disclosure of the collected information; rules that require the information to be secure and confidential; procedures to remove and destroy old data and remedies for the violation of statutory and constitutional rights and penalties for misuse of personal information.

The Intelligence Gathering Functions of the CIA and FBI Should Remain Separate and Outside the Homeland Security Department

We commend the Administration for leaving the intelligence gathering function out of the new Department. The HSA leaves those functions to the Central Intelligence Agency (CIA) and other intelligence agencies and to the Federal Bureau of Investigation (FBI). While the government must do a better job of analyzing the intelligence information it already collects from both foreign and domestic sources, the Congress should not approve new intelligence gathering powers, much less a new intelligence gathering agency, without a showing that such powers are truly needed and do not unnecessarily tread on Americans' civil liberties.

Under our system of government, the CIA and other intelligence agencies are tasked with collecting foreign intelligence abroad. As a practical matter, these foreign activities have been largely immune from constitutional limits and from oversight by the federal courts, although they are and must remain subject to oversight by the Congress. On the other hand, the FBI collects foreign intelligence in the United States, and also investigates and prevents criminal activity. These domestic activities are clearly constrained by statute and by the Constitution. The FBI's intelligence gathering functions are also subject to oversight by the Foreign Intelligence Surveillance Court.

Blurring of domestic and foreign intelligence gathering functions could have a severe impact on civil liberties, potentially leading to widespread spying on Americans constitutionally-protected political and religious activity. This is already a danger under the relaxed FBI guidelines for domestic investigations recently announced by Attorney General Ashcroft.[10] The Congress should resist any attempt to further erode these protections by including substantial intelligence gathering functions in the new Department of Homeland Security.

The Homeland Security Department Should be Barred from Political Spying

Instead of adding to the Homeland Security Department new intelligence gathering powers that could tread on civil liberties, Congress should consider adding provisions that would prevent the Department from maintaining files on Americans that are not linked to any criminal activity, but instead relate solely to political beliefs and associations. Under the draft legislation, while the Department will not gather intelligence information, it will receive such information in the course of its efforts to prevent terrorism.

Without safeguards, these provisions could lead to abuse. No one wants a repeat of the J. Edgar Hoover era, when the FBI was used to collect information about and disrupt the activities of civil rights leaders and others whose ideas Hoover distained.[11] Moreover, during the Clinton Administration, the "Filegate" matter involving the improper transfer of sensitive information from FBI background checks of prominent Republicans to the White House generated enormous public concern that private security-related information was being used for political purposes. Congress should not provide a future Administration with the temptation to use information available in Homeland Security Department files to the detriment of its political enemies.

One model the Congress could consider is Oregon Revised Statutes § 181.575. It provides that no state law enforcement agency may "collect or maintain information

[10] For a memorandum explaining how these changes threaten constitutional rights, see Interested Persons Memorandum of Marvin J. Johnson, ACLU Legislative Counsel, June 6, 2002, available at <http://www.aclu.org/congress/l060602c.html>

[11] For a discussion of how the FBI engaged in illegal surveillance and harassment of Dr. Martin Luther King, Jr., see Marvin J. Johnson, ACLU Legislative Counsel, *The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King* (January 2002), available at <http://www.aclu.org/congress/mlkreport.PDF>

about the political, religious or social views, associations or activities" of a person or group unless such information "directly relates to an investigation of criminal activities" and there are "reasonable grounds to suspect" the subject "is or may be involved in criminal conduct." Such sensible limits would ensure that the Department is focused on its mission of preventing unlawful terrorist activity, not on keeping tabs on unorthodox or unusual, but constitutionally protected, political or religious activity.

III. Conclusion

The creation of a new Homeland Security Department is truly a massive undertaking. It requires careful and thoughtful consideration. While Congress understandably wants to respond to the Administration's initiative without undue delay, caution is needed to ensure that the basic principles of our government that ensure public accountability of government activity remain intact.

Instead, the Administration's plan weakens many of the laws that are vital to ensuring an open and accountable government, by creating unnecessary blanket exemptions to the Freedom of Information Act, the Federal Advisory Committees Act, and the Whistleblower Protection Act. The plan also fails to provide for an effective review mechanism, instead proposing an Inspector General that may lack sufficient power to provide an effective check on the powerful new Secretary of Homeland Security. Finally, while the plan should be commended for recognizing the importance of the distinction between foreign and domestic intelligence gathering for the protection of civil liberties, safeguards against political spying must be added to avoid a repeat of the abuses of the Hoover era.

Statement of Senator Maria Cantwell
"Immigration Reform and the
Reorganization of Homeland Defense."
June 26, 2002

I would like to thank Senator Kennedy for calling this important hearing today to discuss the challenges to our immigration policy that will result from the proposed restructuring of the INS within the new Homeland Security Office.

We all know that changes need to be made to the INS that will allow it to actually perform its important jobs well on both the service and the enforcement side. As someone representing a border state, I also believe that some integration of the INS and the Customs service on the border makes sense. However, I am not certain that the proposal to move INS in its entirety in the President's plan or the proposal to move only the enforcement side of the INS in Senator Lieberman's bill are the correct approach.

While I agree that some form of integration is indeed crucial to improving security on our borders, we must recognize that each agency within the Department of Homeland Security must be functional in and of itself in order for the entire Department to work effectively and safeguard all Americans. In the case of INS, we will not be able not to repair a dysfunctional agency by simply moving it from under the jurisdiction of the Department of Justice to under that of the Department of Homeland Security. Remember this is an agency that issued student visas to al Qaeda terrorists Mohamed Atta and Marwan Al-Shehhi six months *after* they killed over three thousand innocent individuals on September 11.

I am concerned about moving only the enforcement side of INS into the Homeland Security Department because I believe that coordination between the enforcement and service arms of the INS is critical to improving the ability of the INS to process information about those seeking entry to this country and tracking those currently in the country. Placing only the enforcement side of the INS under the Department of Homeland Security will prevent the service and enforcement sides from communicating, essentially mirroring problems we have already seen by not coordinating among agencies. Alternatively, including the service side of INS in the Homeland Security Department is a cause for concern as the transfer has the potential to exacerbate the problems INS is known for: delays, lost paperwork, and an inability to provide consistent answers to reasonable questions both from immigrants and from businesses.

While we need to improve our domestic defenses and look at new ways to improve border security and infrastructure protection, we also need to be able to respond better to threats of terrorism. That means that our single highest priority needs to be improving our ability to obtain, analyze and use intelligence information.

I welcome this important hearing to consider how to remake the INS into an agency that provides accurate information to businesses and to immigrants, and that also operates as an effective intelligence agency with the Department of Homeland Security that makes informed decisions about whom to allow into this country.

As we consider how a restructured INS should look, we must be sure that in enforcing our immigration laws, the INS does not rely on stereotyping and ethnic profiling. The restructuring of INS will be a huge

failure if Congress mandates changes without also providing clear direction, proper oversight, necessary resources and adequate funding.

The values that make this a great country and the values that are central to our identity as a nation include tolerance, diversity, and an openness to public scrutiny of government actions. September 11th has forever changed all of our lives. As lawmakers, we have an obligation to fight ethnic profiling with the same furor that we do terrorism. If we do not, I fear that the principles by which we live by, and the values we hold dear, are in serious jeopardy. It does not benefit Americans to secure our safety at the expense of our constitutional values. We must act in a way that preserves our values *and* secures our safety. I look forward to the testimony of the witnesses today and look forward to their thoughts on meeting the challenge of improving both domestic security and management accountability in the INS.

Table 1. Summary Information on Foreign-born Terrorists Included in This Study (Grouped by Immigration Status)

Terrorist	Immigration Status[a]	Evidence of Immigr. Violation[b]	Terrorist Plot
Nidal Ayyad	Naturalized U.S. Citizen	No	1st WTC Attack
El Sayyid Nosair	Naturalized U.S. Citizen	No	NY Landmarks
Ali Mohammed	Naturalized U.S. Citizen	No[c]	African Embassy Bombing[d]
Khalid Abu al Dahab	Naturalized U.S. Citizen	Yes	African Embassy Bombing[d]
Wadih el Hage	Naturalized U.S. Citizen	No	African Embassy Bombing[d]
Essam al Ridi	Naturalized U.S. Citizen	No	African Embassy Bombing[d]
Mahmud Abouhalima	Permanent Res.	Yes	1st WTC Attack
Mohammed Abouhalima	Permanent Res.	Yes	1st WTC Attack
Ibrahim el Gabrowny	Permanent Res.	No	NY Landmarks
Mohammed Saleh	Permanent Res.	No	NY Landmarks
Amir Abdelg(h)ani	Permanent Res.	Yes	NY Landmarks
Fadil Abdelg(h)ani	Permanent Res.	Yes	NY Landmarks
Tarig Elhassan	Permanent Res.	No	NY Landmarks
Fares Khallafalla	Permanent Res.	No	NY Landmarks
Siddig Ibrahim Siddig Ali	Permanent Res.	No	NY Landmarks
Matarawy Mohammed Said Saleh	Permanent Res.	No	NY Landmarks
Abdo Mohammed Haggag	Permanent Res.	No	NY Landmarks
Ahmad Ajaj	Illegal Alien	Yes	1st WTC Attack
Mohammed Salameh	Illegal Alien	Yes[c]	1st WTC Attack
Eyad Ismoil	Illegal Alien	Yes	1st WTC Attack
Gazi Ibrahim Abu Mezer	Illegal Alien	Yes	NY Subway
Lafi Khalil	Illegal Alien	Yes	NY Subway
Ahmed Ressam	Illegal Alien	Yes	Millennium
Abdelghani Meskini	Illegal Alien	Yes	Millennium
Abdel Hakim Tizegha	Illegal Alien	Yes	Millennium Plot
Zacarias Moussaoui	Illegal Alien	Yes	9/11 Attacks
Satam al Suqami	Illegal Alien	Yes	9/11 Attacks
Nawaf al Hamzi	Illegal Alien	Yes	9/11 Attacks
Hani Hanjour	Illegal Alien	Yes	9/11 Attacks
Mir Aimal Kansi	Asylum App.	Yes	Murder of CIA Employees
Ramzi Yousef	Asylum App.	Yes	1st Attack on Trade Center
Sheik Omar Abdel Rahman	Asylum App.	Yes	Plot to bomb NY Landmarks
Waleed al Shehri	Tourist	No	9/11 Attacks
Wail al Shehri	Tourist	No	9/11 Attacks
Mohammed Atta	Tourist/Student	Yes[c]	9/11 Attacks
Abdulaziz Alomari	Tourist	No	9/11 Attacks
Marwan al Shehhi	Tourist/Student	No	9/11 Attacks
Fayez Ahmed	Tourist	No	9/11 Attacks
Mohand al Shehri	Tourist	No[c]	9/11 Attacks
Hamza al Ghamdi	Tourist	No	9/11 Attacks
Ahmed al Ghamdi	Tourist	No	9/11 Attacks
Khalid al Midhar	Business	No	9/11 Attacks
Majed Moqed	Tourist	No[c]	9/11 Attacks
Salem al Hamzi	Tourist	No	9/11 Attacks
Ahmed al Haznawi	Tourist	No[c]	9/11 Attacks
Ahmed al Nami	Tourist	No	9/11 Attacks
Ziad Samir Jarrah	Tourist	No	9/11 Attacks
Saaed al Ghamdi	Tourist	No	9/11 Attacks

[a] Immigration status at the time they committed their crimes.
[b] A "yes" means that the public record indicates that the individual violated immigration law at some point. A "No" means that there is no evidence in public sources of a violation. Of course, technically, all persons issued visas who came to America with the intent of engaging in terrorism violated immigration law because they assured the State Department they were coming for legal reasons.
[c] Individual probably should not have been issued temporary visa because he either had characteristics of an intending immigrant, someone who is likely to overstay their temporary visa and live in the U.S. illegally, or because he was on the "watch list" of suspected terrorists at the time he received his visa.
[d] The individuals who took part in the African embassy bombing also took part in a wide range of activities in support of al Qaeda.

Table 8. Attacks of September 11, 2001

Name	Status at Time of Terrorist Attack	Country of Birth	Comments
Zacarias Moussaoui	Illegal Alien	France	Granted a student visa in London in February 2001 despite being on a French watch list of suspected Islamic extremists. Could have entered the country without a visa as France is part of the visa waiver program. Received several thousand dollars from an al Qaeda cell in Hamburg. Picked up prior to attacks due to his behavior at flight school (and he had violated the terms of his visa.) Charged in Dec. for his part in the attacks. Attended flight school in the U.S. and may have been the 20th hijacker.
Waleed al Shehri	Tourist Visa	Saudi Arabia	Entered the country on a tourist visa. Brother of fellow hijacker Wail al Shehri. Was a hijacker aboard American Airlines Flight 11 which crashed into the north tower of the World Trade Center.
Wail al Shehri	Tourist Visa	Saudi Arabia	Entered the country on a tourist visa. Brother of fellow hijacker Waleed al Shehri. Was a hijacker aboard American Airlines Flight 11 which crashed into the north tower of the World Trade Center.
Mohammed Atta	Tourist/Vocational Student Visa had been approved	Egypt	Received a tourist visa in 1999 in Germany. Having lived outside his home country for most of the '90s and being unmarried and apparently unemployed, he fit the profile of an "intending immigrant" and should probably have been denied a temporary visa. Entered the U.S. in June 2000, and soon after enrolled in a flight school in Fla., even though he only had a tourist visa. Applied for a change of status to an M-1 vocational student visa. Left the country for Madrid on Jan. 2, 2001, overstaying his visa by one month. While in Spain he may have met with a Spanish al Qaeda cell. Returned to the U.S. on Jan 10, 2001, and admitted to an immigration inspector that he was taking flight lessons and had overstayed his visa on his last visit. He was granted an eight-month extension while the INS processed his change to an M-1 student visa. In April 2001 he traveled to Prague. Received ticket for driving without a license in Fla. and never showed up for the court date but was still issued a Fla. driver's license in May 2001. Considered the ringleader, Atta was aboard American Airlines Flight 11, which crashed into the World Trade Center's north tower.
Abdulaziz Alomari	Tourist Visa	Saudi Arabia	Entered on a tourist visa. Never interviewed by a consular officer; used the Visa Express System in Saudi Arabia. One of the hijackers on American Airlines Flight 11, which crashed in to the World Trade Center's north tower.
Satam al Suqami	Illegal Alien	Saudi Arabia	Orginally entered on a business visa and never left, becoming an illegal alien. One of the hijackers on American Airlines Flight 11, which crashed into the World Trade Center's north tower.
Marwan al Shehhi	Tourist Visa	United Arab Emirates	First entered in May 2000 and soon after enrolled in a flight school in Fla. (the same one as Atta) even though he only had a tourist visa.. Considered one of the plot organizers. Had a joint checking account with Atta. Their account recieved over $100,000 from the United Arab Emerates in the summer of 2000. Attended flight school with Atta and may have been the pilot of United Airlines flight 175, which hit the World Trade Center's south tower.

(cont'd) Table 8. Attacks of September 11, 2001

Name	Status at Time of Terrorist Attack	Country of Birth	Comments
Fayez Ahmed	Tourist Visa	United Arab Emirates	Admitted into the U.S. on a tourist visa in June of 2001. May have had pilot training. One of only two terrorists from the UAE. Was aboard United Airlines Flight 175, which hit the World Trade Center's south tower.
Mohand al Shehri	Tourist Visa	Saudi Arabia	Apparently only 23 and unmarried when he was issued a tourist visa, which probably should have been denied because he fits the profile of an "intending immigrant" (someone who will try to settle illegally in the United States) Was on United Airlines flight 175, which hit the World Trade Center's south tower.
Hamza al Ghamdi	Tourist Visa	Saudi Arabia	Recruited by cousin and fellow hijacker Ahmed al Haznawi for the attacks. Was apparently only 20 and unmarried when he was issued tourist visa, which probably should have been denied because he fit the profile of an "intending immigrant". He was one of the hijackers aboard United Airlines Flight 175, which hit the World Trade Center's south tower.
Ahmed al Ghamdi	Tourist Visa	Saudi Arabia	Recruited by cousin and fellow hijacker Ahmed al Haznawi. A hijacker on United Airlines Flight 175, which hit the World Trade Center's south tower.
Khalid al Midhar	Business Visa	Saudi Arabia	Was issued a business visa in Saudi Arabia without ever being interviewed by a consular officer; instead he used the Visa Express System. In Jan. 2000 a group of al Qaeda operatives met in Kuala Lumpur, Malaysia, to plot the attack on the USS Cole. Malaysian authorities caught the meeting on a surveillance videotape and turned it over to the CIA. Al Midhar entered the United States shortly thereafter. In Jan. 2001, the agency seems to have identified al Midhar. But the CIA seems to have taken until Aug. 2001 to turn over his name to the watch list. But by then al Midhar had re-entered the country. FBI officials initiated a frantic manhunt but never found him. He seems to have helped other hijackers obtain illegal driver's licenses in Virginia and is considered a plot organizer. May have piloted American Airlines flight 77, which hit the Pentagon.
Majed Moqed	Tourist Visa	Saudi Arabia	Only 21 and unmarried when he was issued a tourist visa, which should probably have been denied because he fit the profile of an intending immigrant. Was a hijacker on American Airlines Flight 77, which hit the Pentagon.
Nawaf al Hamzi	Illegal Alien	Saudi Arabia	Entered on a tourist visa in January 2000 and never left the country. He was identified as a possible terrorist by the CIA at the same time as al Midhar and placed on the watch list. But he was already living in the United States illegally. Considered one of the plot's organizers and was the brother of hijacker Salem al Hamzi. Was a hijacker on American Airlines flight 77, which hit the Pentagon.
Salem al Hamzi	Tourist Visa	Saudi Arabia	He was never interviewed by a consular officer and instead used the Visa Express System to receive his tourist visa in Saudi Arabia. Brother of Nawaf al Hamzi. Salem was on American Airlines flight 77, which hit the Pentagon.

(cont'd) Table 8. Attacks of September 11, 2001

Name	Status at Time of Terrorist Attack	Country of Birth	Comments
Fayez Ahmed	Tourist Visa	United Arab Emirates	Admitted into the U.S. on a tourist visa in June of 2001. May have had pilot training. One of only two terrorists from the UAE. Was aboard United Airlines Flight 175, which hit the World Trade Center's south tower.
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Salem al Hamzi	Tourist Visa	Saudi Arabia	He was never interviewed by a consular officer and instead used the Visa Express System to receive his tourist visa in Saudi Arabia. Brother of Nawaf al Hamzi. Salem was on American Airlines flight 77, which hit the Pentagon.

(cont'd) Table 8. Attacks of September 11, 2001

Name	Status at Time of Terrorist Attack	Country of Birth	Comments
Hani Hanjour	Illegal Alien	Saudi Arabia	Received a student visa in September 2000 and entered the country in December to study at a language school in Oakland, Calif. He never attended class and became an illegal alien. His first visit to the United States was in 1990, when he came for an eight-week English course at the University of Arizona. He returned to the United States in 1996, taking lessons at various flight schools in Calif. and Ariz. between 1996 and 2000. It is unclear what kind of visa he used in 1996 or if he ever violated its terms. May have been one of the organizers of the plot. He is the only hijacker who fits the profile of a "sleeper," a terrorist who lives inconspicuously in the country for an extended period before engaging in acts of violence. Was on board American Airlines Flight 77, which hit the Pentagon, and may have been the plane's pilot.
Ahmed al Haznawi	Tourist Visa	Saudi Arabia	Was only 21 and unmarried when issued a tourist visa, which probably should have been denied because he fit the profile of an intenting immigrant (someone who will try to settle illegally in the United States). Received training in bin Laden camps in Afghanistan. Made video justifing attack in March of 2001, which ran on Al Jazeera television in April 2002. Apparently recruited two cousins, Ahmaed and Hamza al Ghamdi. Was on United Airlines Flight 93 which crashed in Pa.
Ahmed al Nami	Tourist Visa	Saudi Arabia	Entered on a tourist visa. Was on United Airlines Flight 93 which crashed in Pa.
Ziad Samir Jarrah	Tourist Visa	Lebanon	Received his visa from an American Consulate in Germany. Was stopped by Maryland state police for speeding September 9; but had a valid Va. driver's license and was only issued a ticket. Was on United Airlines Flight 93 that crashed in Pa. Considered one of organizers of plot.
Saaed al Ghamdi	Tourist Visa	Saudi Arabia	Entered on a tourist visa. Was on United Airlines Flight 93 which crashed in Pa.

*For source informationon, see table reference #8 on p. 66.

(cont'd) Table 8. Attacks of September 11, 2001

Name	Status at Time of Terrorist Attack	Country of Birth	Comments
Hani Hanjour	Illegal Alien	Saudi Arabia	Received a student visa in September 2000 and entered the country in December to study at a language school in Oakland, Calif. He never attended class and became an illegal alien. His first visit to the United States was in 1990, when he came for an eight-week English course at the University of Arizona. He returned to the United States in 1996, taking lessons at various flight schools in Calif. and Ariz. between 1996 and 2000. It is unclear what kind of visa he used in 1996 or if he ever violated its terms. May have been one of the organizers of the plot. He is the only hijacker who fits the profile of a "sleeper," a terrorist who lives inconspicuously in the country for an extended period before engaging in acts of violence. Was on board American Airlines Flight 77, which hit the Pentagon, and may have been the plane's pilot.
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Saaed al Ghamdi	Tourist Visa	Saudi Arabia	Entered on a tourist visa. Was on United Airlines Flight 93 which crashed in Pa.

*For source informationon, see table reference #8 on p. 66.

Statement of Sen. Grassley
Immigration Reform and the Reorganization of Homeland Defense
June 26, 2002

Mr. Chairman, thank you for holding this hearing on the proposal to establish a new Department of Homeland Security.

Although I have some concerns about this plan, we must take some action to put the government in a better position to prevent and respond to terrorism. The creation of a department to oversee homeland security is a tremendous undertaking for the White House and will face multiple challenges, including overcoming the established agencies' desire for self-preservation and the long-standing interagency turf battles. Regardless of these difficulties, we have no choice but to strengthen our national security, and I appreciate the President's commitment to doing so. If a new Department of Homeland Security is the answer, I'll do everything I can to enhance the effectiveness of this new department.

It seems once again we're discussing ways to improve the INS and acknowledging the need for long overdue reforms to the agency. Our subcommittee discussed similar issues on May 2nd, and now we're faced with more questions about where the INS actually fits in our executive branch of government.

I am very open minded about the President's initiative to move the entire Immigration and Naturalization Service to a new department. This merge may encourage the INS to work harder, move quicker on internal reforms, and eliminate some of the systemic problems in the process. It may raise the bar for the INS, forcing them to step up their efforts on terrorism and border security. It may raise morale if given a new mission, and give employees an opportunity at a fresh start in reviving this troubled agency.

I know some of you here today think that the Service may

suffer if it is put in an agency with a counter-terrorism mission. I think the same could be said about the INS' current position at the Justice Department. In other words, the DOJ is our nation's largest law firm, representing the citizens in enforcing the law in the public interest. The INS has been operating in this environment since 1940.

If we place the two critical components - enforcement and service functions - into two separate Departments, *we may actually be threatening service to new residents and visitors.* The end result would be greater confusion and less communication. Applications would surely be lost in the shuffle, and approvals would take much longer to obtain.

More importantly, INS restructuring needs to be done *in conjunction* with the move over to a new department. We cannot ignore the current systemic problems.

First, in April, the Commissioner announced the creation of a

Field Advisory Board to act as a liaison between the Headquarters Office of Restructuring and the various field components. I agree that staff input is important and helpful in seeing that systemic problems are addressed. Unfortunately, I fear that the Board members' input has not been taken into full consideration. I have written to the Commissioner about this issue, and look forward to hearing the suggestions put forward by the Board.

Solving the systemic problems at INS needs to involve two-way communication. Exposing the inefficiencies can only make an agency a better one.

Second, as a longtime advocate for whistleblowers, I'm alarmed at what appears to be continued retaliation against those who help spotlight security problems within the agency.

Just recently, I've heard that the supervisors of Border Patrol

agents Hall and Lindemann are possibly being retaliated against for their roles in assisting the Office of Special Counsel and the Inspector General in their investigations. Any bill to restructure the agency, or create a new department, needs to include meaningful whistleblower protections for each and every employee.

Third, the new Department will also need adequate oversight. An aggressive, completely independent Inspector General ensures that agencies perform their mandated duties in the most efficient and cost-effective manner. The Inspector General also investigates allegations of mishandling of sensitive communications and employee wrongdoing. The INS cannot continue to do business without watchful eyes.

I would also like to discuss the issue of who will issue visas

because I think this is quite unclear. I believe the President's proposal fails to address one key issue: the Bureau of Consular Affairs.

It seems to me that if the President wants the Secretary of Homeland Security to issue regulations regarding the visa process, the President should transfer the operational unit – the Bureau of Consular Affairs – to the new Department.

While we are restructuring the INS, I would also like to see reforms made at the Office of Consular Affairs. Foreign service officers, who issue visas abroad, have a difficult job as agents on our first line of defense. Additionally, the INS has the challenging duty to decide if those who enter at our ports are admissible. In such cases, the INS usually defers to the State Department diplomats. This is a problem. The consular officers are approving visas to potentially harmful individuals because their focus is centered on diplomacy efforts. Meanwhile, the INS has to shoulder the blame. This has to change.

As an example, I am very troubled by recent reports that suggest that the Department of State is conducting programs that allow visa applicants to receive approval to come to the United States without proper background checks and consular interviews.

The program recently in question is Visa Express, implemented three months prior to the attacks on New York and the Pentagon. Residents of Saudi Arabia, including non-Saudi citizens, have taken advantage of the program by going through a travel agent for their proper application forms. In fact, three of the nineteen hijackers used this program.

Reforms to the Visa Express program are not needed. Rather, **there needs to be complete termination** of this and other similar programs that give our national security a low priority.

I have written to Secretary Powell requesting a full explanation of how and why "Visa Express" was re-authorized under his watch. I am also seeking information from the State Department's Inspector General on other programs, aside from the Congressionally-approved Visa Waiver Program, that are currently running at the State Department.

Another example in recent news are the reports that student visas often becomes a visa-for-sale operation that has allowed terrorists to enter the country. The U.S. has delegated its role in selecting immigrants to thousands of institutions whose incentives are purely financial and do not coincide with the national interest. Some institutions look and act like visas-for-sale storefronts. Several of the September 11 terrorists entered the United States on student visas or applied to extend their stays under the student-visa program. The incentive for schools to attract foreign students is clear. Foreigners provide a good source of taxpayer revenue for institutions. Government subsidies for these students averages $6,400 to $9,200. That results in a cost to taxpayers of $2.5 billion a year.

Let me end by saying this - I would like to express frustration

once again about the absence of INS officials here to discuss what the agency is currently undertaking. Why aren't we getting answers straight from the Administration about the challenges at the INS, and how this reorganization will effect their mission and personnel? We will be giving the agency millions of dollars *this year* to run more efficiently and to implement changes.

This is the perfect setting for us all to hear answers from the Commissioner. Nevertheless, I appreciate the witnesses' time to share their thoughts on immigration reform.

Thank you.

June 26, 2002 Contact: Margarita Tapia, 202/224-5225

STATEMENT OF SENATOR ORRIN G. HATCH
RANKING REPUBLICAN MEMBER
Before the Senate Committee on the Judiciary Subcommittee on Immigration
Hearing on

"Immigration Reform and the Reorganization of Homeland Defense"

Thank you, Mr. Chairman, for allowing me an opportunity to offer a brief statement. The President has acted boldly and correctly in requesting that certain functions of our government relating to security be consolidated under the umbrella of a new agency to improve our efforts to fight terrorism. Under the President's leadership, the new agency will enable our government to better detect, prevent, and respond to acts of terrorism.

One of the key components of the President's plan, if not the most key, is the inclusion of the Immigration and Naturalization Service in the Department of Homeland Security. We all agree that the INS must do its part to protect our borders and, at the same time, facilitate immigration services; the only question is what we must do - including where we place the INS under the proposed scheme and how we fix its existing problems - to meet these sometimes dueling directives.

To illustrate the dynamics of the INS, consider the following: The enforcement functions of the INS primarily include border control, inspections at ports-of-entry, and detention and removal of aliens. In 2001, there were more than 330 million inspections of non-citizens. Also, the INS is responsible for overseeing more than 6,000 miles of border with Canada and Mexico and, last year, the agency apprehended more than 1.2 million illegal aliens and removed more than 175,000 criminal and other illegal aliens. However, the job of the INS is more than preventing unlawful entry or deporting those here illegally. The service functions of the INS include adjudicating immigrant petitions, both family and employment, applications for refugee and asylum status and applications for naturalization. The INS received more than 7.9 million applications for immigration benefits in 2001 and has a backlog of nearly 5 million applications for immigration benefits. Lastly, it is important to note that the INS has an annual budget of approximately $6.3 billion and employs nearly 40,000 staff. Thus, what we do with the INS will have far-reaching consequences and we must make the right decision the first time.

A transferred, but not reorganized INS is not useful. The President understands this, as evidenced by his request that the INS be transferred in its entirety to the Department of Homeland Security and the enforcement and service functions be thereafter split. We have the tool in our hands, the Immigration Reform, Accountability, and Security Enhancement Act of 2002 (S. 2444), to accomplish that purpose. The Chairman and the Ranking Member of this subcommittee, along with myself and others, recently introduced that critical piece of legislation and we all firmly believe that it will do the job. Specifically, S. 2444 will utilize a director (similar to the present-day commissioner) to intimately oversee conflict between enforcement and service when it arises.

Some argue that it is more appropriate to move only select components of the enforcement arm of the INS to the Department of Homeland Security. I disagree. First, as S, 2444 provides, there must be someone to closely oversee the conflict between enforcement and services and to ensure that both receive adequate attention. Removal of only the Border Patrol from the INS for inclusion into the new department would create a greater detachment between the two missions, not less. In other words, instead of a commissioner or director to oversee conflict, such could only be resolved between the Secretary of the Department of Homeland Security and the Attorney General. In the end, such a plan does not allow the sharing of information that our government needs to effectively protect us from terrorists and those who would do us harm.

However, because the INS must have the resources and authority it needs to meet its two missions of enforcement and service, we should consider all options. I continue to be interested in whether the INS should be a division of its own - a fifth division - under the new plan. In short, with all of the responsibilities and existing problems of the INS, we must determine whether it merits its own division. I know several of you will testify today as to the value of such a proposal, and I very much look forward to your comments.

Lastly, I know some of you will testify concerning the Executive Office for Immigration Review which, under the President's plan, could be transferred to the new department anytime during a 12-month period following enactment. I would specifically like your comments as to whether it would be preferable to keep it within the Department of Justice or even create an independent agency court.

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Senate Judiciary Subcommittee on Immigration

Hearing on Immigration Reform and the
Reorganization of Homeland
Defense

June 26, 2002

Statement of Professor Bill Ong Hing

University of California, Davis, School of Law and Asian American Studies
National Advisory Council, National Asian Pacific American Legal Consortium

AFFILIATES
Los Angeles
Asian Pacific American
Legal Center

New York
Asian American Legal
Defense & Education Fund

San Francisco
Asian Law Caucus

Good afternoon. On behalf of the National Asian Pacific American Legal Consortium, I would like to thank Chairman Kennedy and Ranking Minority Member Senator Brownback for inviting us to testify on this critical issue.

My name is Bill Ong Hing. I am a member of NAPALC's National Advisory Council. I am a Professor of Law and Asian American studies at the University of California, Davis. I am also the general counsel the Immigrant Legal Resource Center in San Francisco, an organization I helped to found. I began my legal career as a legal services attorney with San Francisco Neighborhood Legal Assistance Foundation in 1975, and I have represented immigrants before the Immigration and Naturalization Service for over a quarter of a century.

I was appointed to the U.S. Department of Justice Citizens' Advisory Panel by then Attorney General Janet Reno. The Advisory Panel advises the Attorney General with respect to the Immigration and Naturalization Service and Border Patrol training and misconduct. I was also named to the National Research Council's Committee on Immigrant Children and Family Health and serve as a trustee for the Rosenberg Foundation.

I am the author of several books, including: T*o Be an American: Cultural Pluralism and the Rhetoric of Assimilation; Making and Remaking Asian American Through Immigration Policy;* and *Handling Immigration Cases.*

My testimony outlines the views of the NAPALC with regard to the Bush Administration's recent proposal to reorganize the federal government and create a new Department of Homeland Security. Specifically, my testimony focuses on the Administration's proposal to transfer the functions currently performed by the Immigration and Naturalization Service (INS) and the Department of State to the proposed new Department of Homeland Security.

As you know, NAPALC is a national expert on immigration policy issues. Almost two-thirds of the Asian American population are immigrants and approximately one third of the immigrants who come to the United States each year are from Asia, mainly to join other family members already here. As a result, the ability of the INS to function fairly, efficiently and effectively has a significant effect on our community.

Balancing our need to secure our borders with our other needs as a nation.

President Bush has said that the mission of the new Department of Homeland Security would be to prevent terrorist attacks within the United States, to reduce America's vulnerability to terrorism, and to minimize the damage and recover from attacks that may occur. In his message to Congress urging support of the new Department he noted the need to balance our efforts to secure our borders while expediting the legal flow of people and goods on which our economy depends. While NAPALC does not have a view as to the establishment of such an agency, NAPALC does have expertise based upon its experience and that of its affiliates, the Asian Pacific American Legal Center in Los Angeles, the Asian Law Caucus in San Francisco and the Asian American Legal Defense and Education Fund in New York City, on whether the INS belongs in such an agency. Not only is immigration critical to our economy, as President Bush has noted, it is also critical to our families and communities.

The need to better secure our borders to minimize the ability of terrorists to enter the United States appears to be the impetus for the Administration's proposal to place the Immigration and Naturalization Service ("INS") within the Department of Homeland Security. The question that is posed to us by this Subcommittee is whether moving the INS and some of the visa functions of the State Department into such a vast and disparate bureaucracy will indeed improve our national security, both immediately and over time, while also serving our nation's interest in an efficient and fair immigration process.

This question of how to efficiently, effectively and fairly regulate immigration is one that we must answer with an eye not only to our immediate fears, but to how the answer shapes us as a nation over the long term. We must consider whether such an arrangement would actually make us safer from terrorism, whether there are alternatives or modifications that will enhance our security without unnecessarily harming families and our internationally-based economy, and how placing the responsibility for immigration and naturalization functions unrelated to national security in an anti-terrorism organization would affect the day-to-day administration of our national immigration laws and procedures, as well as how immigrants themselves are viewed by fellow Americans.

Moving all of INS and visa policy functions to Department of Homeland Security will not make us safer.

While having Department of Homeland Security take over INS functions may seem attractive to some, the question that must be answered is whether it makes sense. Implicit in this inquiry is a principle recognized by this Congress in the Enhanced Border Security and Visa Entry Reform Act: our most effective security strategy is to improve prescreening of immigrants so as to keep out those who mean to do us harm, while admitting those who come to build America and make our nation stronger. We believe the nation needs a targeted and efficient use of our anti-terrorism resources.

The United States has become the great nation it is today because of its strong tradition of welcoming immigrants from around the world who bring with them their ideas, skills, labor, creativity and respect for freedom. One of the reasons our economy is the strongest in the world is because every year, millions of nonimmigrant tourists, business people and foreign students are welcomed to the United States. The overwhelming majority, and I daresay virtually all, of these non-immigrants pose no security threat to the community. The same can be said for the immigrants who enter the country as refugees, asylum seekers and family members in comparatively smaller numbers with significant pre-screening.

Thus, the vast majority of immigrants and non-immigrants are simply not relevant to the issue of national security and to make them so would pose an unnecessary distraction and a drain on resources of the new Homeland Security Department.

There are more effective alternatives to putting INS in Department of Homeland Security.

Long before September 11, INS miscues provided legitimate fodder for criticism and calls for reform, and in some cases dismantling, of the agency. NAPALC has long supported the need

for INS reorganization. However, restructuring INS is not enough. Congress has played a part in the problem. The number and complexity of the laws it has passed in the last decade with unreasonable sunset dates, quotas and convoluted restrictions has taxed an already overburdened agency. True immigration reform that addresses the immigration backlogs and provides for laws that are easier to understand and implement is what is most critically needed.

The need to reform INS and the need to provide better national security should not be confused. The temptation to conflate the two issues is enticing. They are related but are separate issues. With the proper overhaul, resources and management, the INS is well-positioned within the Department of Justice to provide the type of scrutiny we all want of every incoming immigrant, as well as non-immigrant students and visitors, especially with the assistance of the State Department's visa offices around the world.

A successful reorganization of INS within an environment of an even more massive government restructuring require to create the new Department of Homeland Security is highly unlikely. Effectively fixing INS is at the core of better addressing our national security and that will be put at great risk without the necessary resources and internal restructuring. Moving INS will only make it more dysfunctional.

This country cannot afford to equate immigration with terrorism.

As our recent history has shown, native-born citizens are equally capable of terrorist acts. Placing all of INS in the new Department of Homeland Security would mark a radical shift in the United States' tradition as a nation of immigrants. It would redefine our nation based upon principles of exclusion and xenophobia. It is a fundamental truth that America's very strength lies in our diversity that is the result of being a nation built on immigration.

Not only are family reunification and employment visas important for relatives and businesses in the United States, immigration is vital to many parts of the United States. As population declines in regions of the country such as Iowa, Pittsburgh, Philadelphia, Louisville, and Baltimore, leaders in those areas recognize the need to attract more immigrants. They are looking to Washington for assistance in facilitating the entry of workers and families to their regions, knowing that immigrants can help to revitalize and sustain their communities.

For this reason, it is NAPALC's position that our nation's immigration policy can best contribute to national security if this policy is developed and executed by an organization that is effectively, efficiently, and fairly reorganized and given a higher status within the Department of Justice. This plan would give our nation's immigration function a higher priority, with the commensurate organizational authority and control over necessary resources. This agency should be duly equipped to face the enormous task of managing our nation's immigration policy and admitting and monitoring the whereabouts of non-immigrants. This job cannot be accomplished by an agency buried within a new, wide-ranging department. The agency should be headed by an Associate Attorney General for Immigration Affairs as was contemplated in both S. 2444 and H.R. 3231.

This would also alleviate the inefficiencies and administrative backlogs that already plague INS services, and avoid their exacerbation by inclusion in an agency whose narrow mission does not include services and requires a different orientation, as well as a different set of skills and criteria. Immigration services generate fees which can fund the improvement of those services. Within an agency whose mission is to stop terrorism, there will be a constant temptation to raid the fee accounts, unfairly and unwisely diluting payments made by INS customers for efficient and effective services.

The plan would also leave the immigration and naturalization function in an organization that bears the responsibility for enforcing our civil rights laws. Indeed, there currently is a unit within the Department of Justice enforcing prohibitions on alienage-based discrimination against those who "look or sound" foreign or who have "foreign sounding" names.

This plan places emphasis where emphasis is due: on smart, controlled immigration, with focused scrutiny directed by-- as with the FBI or the CIA -- a Department of Homeland Security left unencumbered by responsibility for functions unrelated to national security.

The Department of Homeland Security simply cannot subsume every function of our national government that encompasses a national security concern. But it can develop the expertise and focus to collect, process, and share anti-terrorism information with the entities responsible for administering the broad policy areas that can't be effectively administered by one gargantuan agency. Just as the FBI and CIA will perform a myriad of functions best left to their expertise and organizational culture, yet will also improve their anti-terrorism efforts by smart and efficient coordination with the Department of Homeland Security, so can—and should—a reorganized immigration and naturalization agency.

Keeping the Focus on National Security.

Should Congress deem it necessary to at least transfer some border enforcement functions of INS the new Homeland Security Department, immigration and naturalization services should nevertheless remain with the Departments of Justice and State.

Services such as naturalization, green card processing, refugee and asylum processing and employment-based visas need to be in an agency better able to foster a professional service mission and attract employees who have the skills and temperament suited for providing services to the individuals, families and businesses who depend on them. The responsibility and authority to develop policy and regulations for these functions should lie with this agency as well.

Certain non-terrorist enforcement functions should remain in the Department of Justice so that services and immigration enforcement are closely coordinated. This would include the detention of non-terrorist aliens, such as asylum-seekers, indefinite detainees, and certain criminal aliens. Other enforcement operations, such as work site enforcement or other types of interior enforcement, could also remain within the Department of Justice in a new immigration agency.

Certain enforcement functions related to potential terrorists, including border and port enforcement, can be fit within Department of Homeland Security. Offices within both the Department of Justice and the new Department of Homeland Security should be created to coordinate enforcement responsibilities, just as there would presumably be for coordination between the Department of Homeland Security and the CIA or FBI.

While service and enforcement functions of the current INS clearly have areas of overlap, scrutiny of exclusion grounds does not have to be sacrificed in the development of a separate visa and naturalization service entity. Given cutting-edge technology that has been available for many years from Silicon Valley-type companies but never implemented at the INS, issues of data storage, confidentiality, high volume traffic, inter-agency communication and access, and security are quite possible.

The vast majority of immigrants seeking service from the INS are of no interest to a national security agency seeking to control entry of those who would do us harm. They are persons who are already in the United States. They are lawful permanent residents seeking naturalization, and non-immigrants seeking adjustments of status. They are residents who need employment authorization documents or persons already in the United States requesting the protection of asylum. They are young girls or women brought to this country by traffickers or smugglers. They are unaccompanied minors seeking protection and support. Over time, the strong tendency of a Department of Homeland Security would be to treat these people as though they were potential terrorists, regardless of the need to do so -- wasting limited resources and undermining our other national priorities.

The issue of national security is indisputably an important concern to all of us. But subsuming visa and naturalization services within the domain of Homeland Security is not necessary, especially when other priorities would be compromised unnecessarily. One such interest is in providing efficient and fair service to immigrant, nonimmigrant, and naturalization applicants.

Most applicants are not represented by counsel nor by a community based organization. Instead, they stand in line themselves, fill out their own applications, and rely on the agency to treat them and their families fairly. The agency has the obligation to assess the application efficiently, objectively, and hopefully in a timely manner. That is unlikely to happen in an agency whose mission is based on anti-terrorism. It is all too likely that services will not be given the resources, structure and environment necessary to fulfill its responsibility to immigrants, their families, and employers. This will undermine families, communities, and the economy.

NAPALC advises against the President's plan on placing all of INS within the Department of Homeland Security. We propose, along with the United States Conference of Catholic Bishops (USCCB) Migration and Refugee Services, that the INS be reorganized and revitalized as a separate agency at a higher position within the Department of Justice. If, however, Congress deems it necessary to place some enforcement functions of the current INS into the Department of Homeland Security, we recommend that only those immigration functions which are necessary to assist in the detection and prevention of terrorist threats be placed in this new agency.

Furthermore, judicial functions should remain independent in order to ensure the fair and objective interpretation of U.S. immigration and asylum laws. The Executive Office for Immigration Review (EOIR) is currently an entity outside INS but within in the Department of Justice. Any restructuring should create an independent commission for EOIR to ensure the integrity of the judicial process by providing judicial independence.

Thank you for your consideration of our views.

Testimony
"Immigration Reform and the Reorganization of Homeland Defense"
United States Senate Judiciary Committee, Subcommittee on Immigration
June 26, 2002
Susan F. Martin, Director
Andrew Schoenholtz, Director of Law and Policy Studies
Institute for the Study of International Migration
Georgetown University

Thank you for providing this opportunity to present testimony on the reorganization of immigration functions to support homeland security.

There is urgent need for legislation to improve the implementation of our immigration laws and policies, not least because of the events of September 11, 2001. The immigration system must restructure to improve its capacity to carry out the many enforcement and service functions required of it. The aim of immigration policy is to facilitate admissions that are beneficial to our national interests and consistent with our international obligations, while guarding against entry of those whose admission is unauthorized, particularly if they pose a threat to our national security. The restructuring must support both of these goals.

The Bush Administration has recently proposed the establishment of a new Department of Homeland Security, which would bring together numerous government offices. The entire Immigration and Naturalization Services (INS), including both its enforcement and service activities, would be transferred from the Justice Department to the new department. The Bush proposal authorizes the President to transfer the Executive Office for Immigration Review (EOIR) to Homeland Security as well. It also gives the new Department authority over visa issuance, but gives the new secretary discretion to permit State Department Consular officers to carry out visa issuance operations.

Placing all of these functions within the Department of Homeland Security will serve neither goal of immigration policy adequately and could undermine efforts to achieve true homeland security. Immigration management includes two core functions: border and interior enforcement of the immigration laws (enforcement) and adjudication of immigration, asylum and naturalization applications (services). It also requires an independent review process to ensure that those implementing policies carry them out properly and in accordance with Congressional intent. These are separate, although interconnected activities, with each function demanding vastly different skills, training, and resources.

On the whole, placing the enforcement activities in the Department of Homeland Security makes sense if it leads to better coordination with other enforcement and intelligence agencies responsible for securing our borders, including Customs Service and Coast Guard. We conclude, however, that Homeland Security is the wrong place for adjudication of applications for immigration, refugee and citizenship benefits as well as for the administrative review of immigration decisions. A far better option is to combine

the services function of INS with those already existing at the State Department, which would have responsibility for immigration, refugee and citizenship services. With regard to the review of immigration decisions, we urge creation of an independent agency.

The Adjudication of Immigration, Refugee and Citizenship Benefits

Every year, the INS and the Bureau of Consular Affairs at the State Department (Consular Affairs) make millions of decisions regarding who is eligible to come to or remain in the United States legally. In recent years, the INS annually approved about 700,000 permanent resident petitions, 750,000 naturalization applications, 75,000 refugee-status applications, and 12,000 asylum cases. In recent years, Consular Affairs annually issues about 400,000 permanent visas and well over six million nonimmigrant visas. Consular officers deny another two million applications for nonimmigrant visas. Consular Affairs also provides a full range of citizenship services both domestically (issuance of well over six million passports annually) and abroad (e.g., citizenship determinations and registration of births of U.S. citizens overseas).

The Bush Administration proposal would move the entire INS out of the Justice Department and into an office of Border and Transportation Security. This office would consist of four parts: Border Security, Transportation Security, Coast Guard, and Immigration Services. While not clear at first, news reports now indicate that the visa function presently carried out by the State Department's Bureau of Consular Affairs would be under the authority of the Secretary of Homeland Security who could delegate that authority to the State Department.

There is no obvious advantage of placing immigration, refugee, asylum and citizenship adjudications inside the Department of Homeland Security. Many of these adjudications performed involve decisions about individuals who the United States wants to enter and stay for extended periods, even permanently: hardworking contributors to our economy, family members, people fleeing persecution. Most have U.S. sponsors who petition for their admission. Many of these desirable people will become citizens. Although it is essential to ensure that those who pose a risk to our security do not abuse these programs, it is also clear that the vast majority of these immigrants serve our broad national interests.

To give a national security agency the responsibility for determining who enters the U.S. and who becomes a citizen is fraught with dangers. The focus of this department is made clear by the four major offices it would create: Chemical, Biological, Radiological, and Nuclear Countermeasures; Emergency Preparedness and Response; Information Analysis and Infrastructure Protection; and Border and Transportation Security. As configured and given its principal mandate, it is unlikely to have the expertise or will to make the very complex decisions involved in visa issuance and determinations of eligibility for immigrant admissions and naturalization. As a result, many legitimate tourists, business visitors, high skilled workers, family immigrants, and refugees would be denied the opportunity of entering the United States or becoming citizens. Considerable economic and social damage to important U.S. sectors may be done if the Department of Homeland

Security is unable to perform the adjudications of these applications in a timely and effective manner. Yet, if the new Department were to expend the human and financial resources needed to properly carry out the immigration and naturalization service functions, the result would also be detrimental because these efforts would come at the expense of the new agency's principal responsibility—to protect the security of borders.

If Homeland Security is not an appropriate agency to adjudicate who is eligible to visit, reside, or become a citizen of the U.S., what existing agencies can do this well? One alternative is to leave the immigration services function at DOJ, where both the enforcement and services functions have had their home since 1940. In that year, President Roosevelt's Reorganization Plan transferred INS there from the Department of Labor as a wartime national security measure.

Leaving services at DOJ is problematic, however. The mission of the Justice Department is law enforcement. The principal agencies are: the Federal Bureau of Investigation, the Drug Enforcement Administration, the Criminal Division, the Bureau of Prisons, the U.S. Marshals Service, the Civil Division, the Civil Rights Division, and the Antitrust Division. Immigration services have not fared well at DOJ. Historically in competition with immigration enforcement, services have been neglected. On the whole, DOJ has failed to provide professional services of the kind the world's leading immigration country wants and should have. If left within Justice Department, a services-only INS is unlikely to be given the attention and resources it needs to accomplish its mission effectively.

A far better solution is to place the services now performed by INS into the State Department, which already plays a major role in this area. The U.S. Commission on Immigration Reform, also known as the Jordan Commission, essentially recommended this in 1997 when it called for the establishment of a new office of the Undersecretary for Citizenship, Immigration and Refugee Admissions at the State Department. The new Undersecretary would have three bureaus: the Bureau of Immigration Affairs would focus on the processing of applications for permanent residence as well as temporary visits to the United States; the Bureau of Refugee Admissions and Asylum Affairs would have responsibility for adjudicating applications for overseas refugee admissions, asylum, temporary protected status, and other humanitarian statuses; the Bureau of Citizenship and Passport Affairs would be responsible for naturalization, other determinations of citizenship, passports, and overseas citizens services.

Joining INS service activities with visa and other services at State would consolidate the responsibility for immigration-related services in one department. Fragmentation of responsibility has long been a problem that has impeded both efficiency and security. Consolidation can enable a more streamlined and accountable adjudication process, involving fewer agencies but greater safeguards. Such a consolidation would result in faster and better determinations of these benefits. Placement of full responsibility for these activities in the State Department also ensures that a Department that has been historically committed to carrying out these functions and has the overseas presence necessary for visa issuance will carry them out. State has devoted a major share of its

personnel and its capital and operating resources to visa, passport and citizenship adjudications at embassies and consulates in more than two hundred countries and in passport offices in fifteen U.S. cities.

Consolidation also serves broader national interests. For example, the U.S. is able to maintain a presence in many countries around the world with little cost to American taxpayers through fees generated by visa processing. Moreover, a more efficient and secure system will send the right message about the goals of our immigration system—that legal immigration contributes to economic growth, stable families, humanitarian interests, and positive relations with other countries.

The State Department already has the capacity to operate both an efficient and secure program. State Department visa and passport officers are highly efficient, processing millions of applications with far fewer backlogs and snafus than those generated by their colleagues at INS. This is not to say that consular officers rubber stamp applications; the very high level of rejections seen in current visa issuance attests to the strict standards that are used in adjudicating applications.

For State to take on these new responsibilities, however, requires some changes in the way the Department currently administers its immigration responsibilities. State will need to show that its primary role in conducting foreign relations does not result in too little attention to domestic responsibilities. The success of the passport function speaks to State's capabilities, but it will need to be vigilant. In today's transnational world, of course, most analysts would argue that such attention to domestic responsibilities serves a foreign relations purpose as well. State will also need to develop mechanisms for consultation with domestic groups representing a broad range of views and interests regarding immigration. The Bureau of Population, Refugees and Migrations (PRM), with extensive relations with domestic groups, is a good example of State's capabilities in this regard.

State also will need to change its historic position on review of consular decisions. Decisions made at INS on many applications may be appealed, but no appeal is available on consular decisions. While State would be overwhelmed if every tourist could appeal a visa denial, it should be able to develop an independent administrative review capacity to hear appeals on important visa decisions, such as immigrant visas and certain nonimmigrant ones with a U.S. petitioner.

Another issue to be addressed is coordination with the Department of Homeland Security and the Justice Department. It is essential that the service agency have access to information about individuals whose admission may pose a threat to national security. It is not essential, however, that services be carried out by either Homeland Security or Justice to accomplish an effective and efficient sharing of data (just as co-location in the same department does not necessarily ensure such sharing). There are many examples of agencies in different departments sharing data as needed to carry out mutually reinforcing missions. For example, Department of Motor Vehicles and police departments share information that allows a police officer to easily find out if a stopped vehicle is registered

and its driver licensed, and a DMV official can find out if the applicant for a drivers license has been stopped for various driving offenses.

The above analysis leads us to the following recommendation. We believe that immigration, refugee and citizenship (naturalization and passport) services should be consolidated in a new office of the Undersecretary for Citizenship, Immigration and Refugee Admissions. This office will also be responsible for coordinating with the new Department of Homeland Security as well as Federal Bureau of Investigation and other law enforcement agencies to ensure that appropriate security safeguards are in effect in adjudicating applications for immigration and citizenship services.

The Formal Review of Immigration Adjudications

The Bush Administration plan for a new Homeland Security Department authorizes the President to transfer the Executive Office for Immigration Review from the Department of Justice to the new department. The immigration review function came to DOJ from the Labor Department in 1940 as part of INS. In that year, the Attorney General established the BIA as a quasi-judicial tribunal and a separate entity at DOJ. The first-level review function of Special Inquiry Officers remained within INS. In 1983, the Board was placed within the newly-created Executive Office for Immigration Review, and the first-level review function was moved to EOIR as the Immigration Court. This meant that this formal review function now sat separately from the INS service and enforcement functions. Today EOIR consists of three major components:

1. The Board of Immigration Appeals (BIA), which hears appeals of decisions made in individual cases by Immigration Judges, INS District Directors, or other immigration officials;

2. The Office of the Chief Immigration Judge (OCIJ), which oversees all the Immigration Courts and their proceedings throughout the United States; and

3. The Office of the Chief Administrative Hearing Officer (OCAHO), which became part of EOIR in 1987 to resolve cases concerning employer sanctions, document fraud, and immigration-related employment discrimination.

In recent years, EOIR has made well over a quarter of a million decisions every year on the legal rights of lawful permanent residents, asylum seekers and undocumented migrants to stay in the U.S. The Immigration Courts annually completed about 225,000 proceedings, 27,000 bond determinations, and 12,000 motions. The Board of Immigration Appeals annually completed about 25,000 appeals from the Immigration Court and 3,000 appeals from District Director decisions.

Formal administrative review of immigration-related decisions—following internal supervisory review within the initial adjudicating body—provides integrity to the immigration system. Such review guards against incorrect and arbitrary decisions and promotes fairness, accountability, legal integrity, uniform legal interpretations, and

consistency in the application of the law both in individual cases and across the system as a whole.

The Bush Administration Proposal authorizes the President to transfer the Immigration Judges, Members of the Board of Immigration Appeals (BIA), and Administrative Hearing Officers to Homeland Security. Simply put, the mission of these quasi-judicial decisionmakers would not fit well with the mission of Homeland Security.

First, these administrative judges operate in a court-like culture. Evidence, witnesses, attorneys, statutes, regulations, legal arguments—this is the everyday life of EOIR. The process is quite meaningful to these arbiters of justice—precisely because their interpretation of the immigration laws affects the destinies of individuals facing persecution or separation from family and chosen country. Second, the substantive law concerns the legal doors that America opens for people from abroad to join our society—from those persecuted because of religious or political intolerance to families trying to stay together.

In only a few of the more than a quarter of a million cases EOIR decides annually does a security issue arise. When those issues arise, the professionals who decide these cases have proven perfectly competent to adjudicate them with the utmost concern for the nation's security. From the security point of view, then, it is not necessary to house this review function with the Department of Homeland Security

Indeed, transferring EOIR to Homeland Security could result in a major shift in the operations of these quasi-judicial proceedings. Security concerns may take on more of a priority than is needed or appropriate in the administration of immigration justice. Attorneys may be regulated pursuant to security priorities that develop in other departmental contexts but are inappropriate in immigration proceedings. In short, Homeland Security's mission may take over the immigration review function. That is not needed to ensure that the security of the American people is protected by EOIR, and it can do serious damage to the government's ability to decide immigration cases in a fair and judicious manner.

Even more troubling, placement of the review function in the Department of Homeland Security will undermine the independence of the appeals process. The agency responsible for enforcing immigration laws should not be responsible for assessing its own performance. This is already a problem in the current system in which the same official (the Attorney General) makes the rules, oversees their implementation, and determines if they are carried out properly. If the review authority passes to the Secretary of Homeland Security, a similar situation will prevail.

Meaningful and effective review must be independent. That is critical both to the reality and the perception of fair and partial review. Our review system moved importantly in that direction in 1983 when EOIR became a separate DOJ agency and thus more insulated from the operations and influence of the initial adjudicatory function. However, EOIR's independence continues to be compromised by the exercise of the Attorney

General's authority over the BIA and the Immigration Court. The chief law enforcement officer of the United States explicitly has used his or her office to accomplish various goals. Sometimes, it results in a more generous reading of the definition of a refugee than the BIA has decided. Other times, it's an order to expedite Immigration Court proceedings for individuals from certain countries, such as Haiti. Such authority and its use render the review system dependent on the politics of the day. That is not the best way to develop a system with integrity. The everyday decisions made by Immigration Judges and BIA members have serious effects—sometimes even life and death—on people's lives. The rule of law, not politics, should govern such decisions.

This issue is of particular concern today when the Attorney General has let the Board know of his dissatisfaction with the exercise of their review role. Analysts like ourselves maintain that Attorney General review of Board decisions compromises the appearance of independent decisionmaking and undermines the stature and autonomy of a quasi-judicial appellate process. Furthermore, as one writer points out, "the subordination of the Board's collective judgment to a single individual's opinion reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body. Although authorized to act independently in its decisionmaking role, the Board hardly can avoid taking into account its perception of the Attorney General's likely view."[1] The same situation would dominate if EOIR were moved to the new Department.

Keeping EOIR at DOJ is only marginally better than moving it to Homeland Security. If INS enforcement is at the new Department, then Justice would be a better home than Homeland Security since the Attorney General will not be executing the law and making judgments concerning those enforcement activities. The independence issue will no longer be a problem.

One other positive reason for keeping EOIR at DOJ is that, unlike the culture that would exist at Homeland Security, the culture at Justice is one at home with judicial decisionmaking. Of course, DOJ officials are usually engaged as prosecutors or government defenders as opposed to administrative judges, but the culture at Justice is fundamentally a legal one.

On the whole, however, a small immigration review function would likely receive little attention at an agency focused on law enforcement of various types. The big players would continue to be the FBI, DEA, and other major DOJ agencies. As the sole immigration-related activity at Justice, the review function would be even less important than it is now at Justice.

[1] Levinson, "A Specialized Court for Immigration Hearings and Appeals," 56 Notre Dame Law Review 644, 650 (1981).

Given the importance of independence in the review function and the fact that no existing Cabinet department is a natural home to this function, two options are available: the statutory establishment of an independent Executive branch agency for review, or the creation of an Article I Immigration Court.

Article I courts differ from Article III courts in that the judges are appointed for terms, as opposed to life, and their salaries are not subject to the constitutional mandate of nonreduction. Moreover, Article I courts typically specialize in one particular area of the law, unlike the courts of general jurisdiction under Article III. Over the years, Congress has created several Article I courts including, but not limited to, the United States Tax Court, the United States Court of Military Appeals, the United States Court of Federal Claims, and the United States Court of Veterans Appeals. With the exception of the Court of Military Appeals, decisions rendered by these Article I courts are reviewable first by the United States Court of Appeals for the Federal Circuit, and then by petition for *certiorari* to the Supreme Court of the United States.

Both an Article I Court and an independent review agency satisfy the need for the independence of the review function. Both alternatives also will elevate the stature of and continue to help professionalize the review function. The major difference is that an Article I Court would be part of the Judicial Branch and an independent agency part of the Executive Branch. The critical factor to be considered is the immigration system's need for flexibility and coordination of functions. For example, the Immigration Court currently coordinates with INS where individuals are held in detention and holds some hearings at detention centers. In the instance of an immigration emergency, Immigration Judges have shifted rapidly to hold hearings where the emergency has occurred. Some experts argue that an independent Executive Branch agency has greater flexibility to respond to such situations than a court that reports to the Judicial Conference of the United States or the Administrative Office of the U.S. Courts.

We recommend that Congress establish an independent immigration review agency. We believe that an independent Executive Branch agency would possess the flexibility and coordination capacity needed to work well with the other agencies in the immigration system. Most importantly, we recommend the creation of such an agency for immigration review because it provides the independence that our immigration system merits.

We would be pleased to answer any questions posed by the Committee.

TESTIMONY OF DANA MARKS KEENER
President, National Association of Immigration Judges
Before the Senate Judiciary Committee
Subcommittee on Immigration
June 26, 2002 2:00 pm

Mr. Chairman, Members of the Subcommittee, I thank you for providing me this opportunity to testify before you regarding the Immigration Court.

I am appearing on behalf of the National Association of Immigration Judges (NAIJ) to provide you with our perspective on where the Immigration Courts should be located in the midst of the debate regarding the proper components to be included in a new Homeland Security Department and in light of the on-going efforts to reorganize the Immigration and Naturalization Service. I am the elected President of NAIJ, which is the certified representative and recognized collective bargaining unit representing the approximately 228 Immigration Judges presiding in the 50 states and U.S. territories. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of AFL-CIO. In my capacity as President, the opinions offered represent the consensus of our members, and may or may not coincide with any official position taken by the DOJ.

Immigration Judges are a diverse corps of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts, and even successful arguments at the United States Supreme Court. Some of us are former INS prosecutors, others former private practitioners. Our ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as ALJs, whose qualifications have been compared with federal district judges.[1]

As you may be aware, in January of this year, the NAIJ published a position paper advocating increased independence for the Immigration Courts. We are submitting that paper as part of today's written testimony for your full consideration. Today I would like to review the major premise of that paper and bring our views into a more current time frame in view of efforts to reorganize the INS and create a new

[1] "The calibre of administrative law judges ... is certainly as high as those of federal district judges..." Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

Homeland Security Department.

When our position paper was drafted, we suggested the model recommended by the U.S. Commission on Immigration Reform ("the Commission"), as an exhaustively studied, thoroughly researched, bi-partisan proposal which was the culmination of years of research involving all parties and players in this complex area. In its final report in 1997, the Commission proposed that the functions of EOIR should be located in an independent executive branch agency.[2]

We do not believe it is the role of NAIJ to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service or components of EOIR other than the Immigration Courts, although it would seem logical to keep EOIR's structure intact.

The Need for Independence for Immigration Courts

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living.[3] When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.[4]

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. Increased public confidence and de facto independence of the decision-makers from the prosecuting
authorities in the immigration enforcement arena is what we believe to be optimal. Not only would creating an independent agency or keeping EOIR at DOJ provide such a solution, but it would also serve to demonstrate an appropriate balance of powers in this extremely sensitive context. In addition, we believe this move could also provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency.

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[2] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 174 (September 1997)]

[3] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)

[4] These cases have also been analogized to criminal trials, because fundamental human rights are so involved in these enforcement type proceedings. See, John H. Frye III, "Survey of Non-ALJ Hearing Programs in the Federal Government," 44 Admin. L.Rev. 261, 276 (1992).]

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA).[5] The INS has virtually unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications, others upon de novo review of an INS denial of an application, and still others upon review of whether an INS decision below was based on sufficient evidence.[6]

To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed. In an effort to ameliorate concerns regarding a perceived lack of independence, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created.[7] In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.[8] In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals

from the INS, creating the EOIR, the agency within the Department of Justice which

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[5] For a concise but comprehensive explanation of immigration court proceedings, see Kurzban's Immigration Sourcebook: A Comprehensive Outline and Reference Tool, 7th Ed. 2000, by Ira J. Kurzban.

[6] Once in removal proceedings, many respondents are eligible for release on bond. The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.

[7] From Wong Yang Sung to Black Robes, Sidney B. Rawitz, Vol. 65 Interpreter Releases No. 17 (May 2, 1988) at 458.

[8] 8 C.F.R. 1.1(1) (1973), Rawitz at 48.

houses these functions to this day.[9]

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today, and now militate toward retaining EOIR at DOJ if all components of the INS are moved to the newly created Homeland Security Department. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[10] Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually.[11] It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. More recent examples of equally disturbing encroachments on judicial independence regrettably occur and these were detailed in our previous position paper.

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress.[12] However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges.[13]

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[9] See, e.g. Rawitz at 458-459; Education and Training Service, Major Issues in Immigration Law, A Report to the Federal Judicial Center, 1987, David A. Martin; The United States Immigration Court in the 21st Century, Institute for Court Management, court Executive Development Program, Phase III Project, May 9, 19999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens.

[10] Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001)

[11] See, "In the Spotlight: the Hon. Michael J. Creppy, Chief Immigration Judge of the United States" in Lateral Attorney Recruitment, Office of Attorney Recruitment and Management, U.S. Department of Justice.

[12] See §240(b)(1) of the INA, as amended by §304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

[13] "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing

Because of this impasse, NAIJ has suggests that legislation be passed mandating prompt implementation of such contempt authority. See Appendix A.

Indeed, promulgation of contempt authority could provide the Immigration Court with an important tool to enforce INS compliance with its orders and to assure that terrorists in Immigration Court proceedings comply with orders closing those proceedings for national security reasons. The Attorney General has issued new regulations for protective orders in national security cases, but the sanctions for violation of those orders are ineffective where they are needed most. The prompt issuance of regulatory authority for contempt power could resolve this problem. At present, the sanction of mandatory denial of any discretionary relief when a protective order is violated is a toothless sanction in those cases where it matters most. Some of these cases will involve aliens engaged in terrorist activities. In a case where an alien has been involved in such activities, he or she will not be eligible for any discretionary relief as a matter of law.[14] The threat of denial of discretionary relief to a terrorist is meaningless; he is not statutorily eligible for such relief in any event. The irony is that the only people that will be deterred by this sanction is those for whom discretionary relief is available, and in those cases it would be unlikely that the Government would have much of an interest in enforcing a protective order. Unless and until the Department of Justice promulgates regulatory authority for the contempt power given to the Immigration Court by Congress, there is no real sanction for a terrorist who flaunts a protective order of the Immigration Court.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The separation of the Immigration Court from the agency which houses INS will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner.[15] In addition,

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contempt authority for Immigration Judges," despite the Congressional mandate. The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens, at page 109, n.313.

[14] About the only form of relief available to an alien engaged in terrorism is deferral of removal under the Convention Against Torture, which is not discretionary.

[15] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 179 (September 1997).

such a structure will provide a needed safeguard against possible prosecutorial excesses.

When reduced to its simplest form, any structure, be it DOJ or Homeland Security, in which the same person supervises both the prosecutor and the judge in "court" proceedings is suspect. One does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged."[16] NAIJ has also provided proposed language to clarify the independent nature of Immigration Judge decisions.[17]

An Independent Immigration Court Can be a Catalyst for INS Productivity

Keeping EOIR outside of the Homeland Security Department can provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency. On January 11, 2001, EOIR's Executive Director established case completion goals for the Immigration Courts and Board of Immigration Review. These goals set target times for the adjudication of various types of cases. When case completion goals were discussed recently at our annual immigration judges conference, there were several specific examples of recurrent situations where the INS is an impediment, rather than a facilitator, to timely case completions. For example, inordinate delays in INS processing of visa petitions, INS forensic evaluation of documents (some of which may go to the identity of a respondent), INS investigations, and INS follow up after the FBI has determined that a respondent's prints show a criminal history are routine causes for INS requested delays of proceedings, sometimes for well over one year. It is not uncommon for the INS to take one year or longer to determine if a respondent has a bona fide marriage to a U.S. citizen, and thus is eligible to apply for lawful permanent resident status. Indeed, the Judges often feel that the current system is set up to let the immigration court act as a tickler system for INS case processing, as opposed to setting up its own internal system with oversight to check on these matters.

One obvious way to deal with these problems would be to require the INS to

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[16] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens at 100 - 105 (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly 1/4 (22%) indicated that the close personal relationships between employees of the INS and the Immigration Courts were a factor in their conclusion that the Immigration Courts were not separate from the INS).

[17] In Appendix B to this testimony, NAIJ has provided a proposed amendment, consisting of merely two sentences, which if added to the current statutory language at INA section 101(b)(4), which would provide unequivocal statutory authority for the decisional independence of Immigration Judges in individual matters pending before them.

meet timely pre-trial deadlines to resolve these issues, or notify the court and parties of delays, so that matters move expeditiously before the court without wasting valuable docket time. However, the lack of any contempt powers hinders this approach.

Frankly, neither the Commission nor NAIJ anticipated that INS or DOJ reorganization would culminate in the departure of the INS from the DOJ. Now that this seems to be the approach favored by the White House, INS Commissioner Ziglar, and many others, NAIJ would like to make our position clear. In the absence of an independent agency status as recommended by the Commission, which remains our first choice, we believe that EOIR should remain in the DOJ. Were the INS to be transferred, (both enforcement and adjudications functions) to the newly created Department of Homeland Security, then an alternative where the Immigration Courts (and EOIR) remain in the DOJ could serve as an acceptable stop-gap solution. The same rationale we detailed in our initial position paper compels that conclusion under these new circumstances. In the present state of affairs, this would be the solution which is most likely to safeguard our most important guiding tenet: decisional independence. By keeping EOIR with DOJ while INS moves to the Department of Homeland Security, some modicum of judicial independence is achieved without the expense of creating an independent agency.

In addition to safeguarding and assuring judicial independence, retaining EOIR in DOJ in that circumstance would allow the Immigration Court to act as a catalyst for INS production in matters before it. Finally, that option would also assure that the individual who appoints immigration judges and who acts as the final arbiter in immigration cases, is a lawyer. To that end, we would propose that Section 802 of the Homeland Security Act of 2002 as proposed, be amended to add to the last sentence "**except that the Executive Office of Immigration Review shall not be transferred to the Department of Homeland Security."**

Under the current system, the Attorney General has the authority to review cases issued by the Board of Immigration Appeals, as the Board requests or as he or she deems appropriate. See 8 C.F.R. Section 3.1(h). Both in the past and in recent years, the Attorney General has used this powerful mechanism to oversee the administration of immigration law.[18] A review of these decisions will show that, in the area of immigration law, which is an extremely complex legal field, it is very important to have a lawyer in this position, as the lines between matters of law and the proper exercise of discretion are not always easy to determine.

The primary impetus behind the universal call for INS reorganization is the need

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[18] See, e.g., Matter of N-J-B-, 21 I&N Dec. 812 (AG 7/9/97); Matter of Soriano, 21 I&N Dec. 516 (AG 2/21/97); Matter of Farias-Mendoza, 21 I&N Dec. 269 (AG 3/27/97); Matter of Cazares-Alvarez, 21 I&N Dec. 188 (AG 6/29/97); Matter of De Leon-Ruiz, 21 I&N Dec. 154 (AG 6/29/97); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (AG 3/18/91); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (AG 7/27/84).

to restore accountability to the system.[19] Implementation of our proposal will satisfy this need in the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the same agency as the INS will create a forum which will provide the needed checks and balances. The Homeland Security Department will be free to focus its mission on the prosecution of those in the United States illegally -- an increasingly compelling focus – while the Attorney General can employ the legal expertise of his agency to assure that due process and fundamental fairness prevail.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's proposal of an independent executive branch agency. This carefully considered recommendation was offered after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. However, at the very minimum, this rationale, modified to meet current reorganization plan, would require maintaining EOIR as an agency within the DOJ. Establishment of an independent Immigration Court in this manner would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, while providing insulation from any political agenda.

We strongly urge you adopt this approach.

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[19] The cries for accountability in recent months have been virtually deafening. See, e.g.,:"Secret Evidence Invites Abuse," Red Bluff Daily News Editorial, 1/9/02; "Questions Raised About Detainees," by Mae M. Cheng, NewsDay, 12/7/01; "U.S. Has Overstated Terrorist Arrests for Years," by Mark Fazlollah and Peter Nicholas, Miami Herald, 12/14/01; "Secret Justice: Ashcroft Orders Closed Courts," by Josh Gerstein, ABCnews.com, 11/28/01; "Ashcroft Offers Accounting of 641 Charged or Held - Names 93" by Neil Lewis and Don Van Natta Jr, New York Times, 11/28/01; "Analysis- Ashcroft Does an About-Face on Detainees," by Todd S. Purdum, New York Times, 11/28/01; "INS Can Overrule Judges' Orders to Release Jailed Immigrants," by David Firestone, New York Times, 11/28/01; "Cases Closed," by Josh Gerstein, ABCnews.com, 11/19/01; "US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists," by Jess Bravin, The Wall Street Journal, 11/15/01; "INS to Stop Issuing Detention Tallies," by Amy Goldstein and Dan Eggen, Washington Post, 11/9/01; "Count of Released Detainees is Hard to Pin Down," by Dan Eggen and Susan Schmidt, Washington Post, 11/6/01; "Justice Department Cannot Confirm How Many Detainees Released," by Terry Frieden, CNN.com, 11/6/01; "Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate," by Christopher Drew and William Rashbaum, New York Times, 114/3/01; "U.S. Holds Hundreds in Terror Probes; Who Are They?," by Chris Mondics, The Record, 11/3/01; "Detentions After Attacks Pass 1000, U.S. Says," by Neil A. Lewis, New York Times, 10/30/01; "Detention and Accountability," New York Times Editorial, 10/19/01; "A Need for Sunlight," Washington Post Editorial, 10/17/01.

APPENDIX A: (language to mandate promulgation of contempt regulations)

NAIJ proposes that Congress enact the following provision:

> Within 120 days of enactment, the Department of Justice shall promulgate regulations implementing the contempt authority for immigration judges provided by INA Section 240(b)(1). Such regulations shall provide that any contempt sanctions including any civil money penalty shall be applicable to all parties appearing before the immigration judge and shall be imposed by a single process applicable to all parties.

APPENDIX B: (language to ensure decisional independence)

NAIJ would propose that Congress act to amend the definition of Immigration Judge at INA Section 101(b)(4) as follows (by adding language in underline to the current statutory definition as shown in full):

> The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under Section 240. In deciding the individual cases before them, Immigration Judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. An immigration judge shall be subject to such supervision and shall performsuch duties as the Attorney General shall prescribe, except that no immigration judge shall be sanctioned or disciplined for the exercise of his or her independent judgment and discretion in the disposition of a case before him or her. An immigration judge shall not be employed by the Immigration and Naturalization Service. [Amendments are underscored].

AN INDEPENDENT IMMIGRATION COURT: An Idea Whose Time Has Come

A Position Paper by the National Association of Immigration Judges
January, 2002

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AN INDEPENDENT IMMIGRATION COURT:
An Idea Whose Time Has Come

Summary

** With DOJ and INS reorganization a top priority after September 11th, the time for structural reform of the Immigration Courts is now

** NAIJ offers a bipartisan solution, which is the result of a multi-year, Congressionally-mandated study conducted in cooler times

** Independence and Impartiality in the hearing process must be safeguarded and this solution is the best way to do so

** Historical factors that caused the removal of the Immigration Court from the INS persist and show that the Court should now be moved outside the Department of Justice

** The Attorney General should not be the boss of the prosecutor and the judge

** The public does not perceive the Immigration Courts as separate from the INS, which undermines public confidence in the process

** Removing the Immigration Courts from the DOJ will enhance administrative efficiency, increase accountability and facilitate Congressional oversight of the INS

** Immigration Judges have unparalleled expertise and experience in this highly specialized and complex area of law

** A Presidentially-appointed Director of an independent Immigration Court will be free to focus on judicial priorities, ensuring administrative efficiency while protecting due process, without the mission conflict of prosecutorial and law enforcement responsibilities.

AN INDEPENDENT IMMIGRATION COURT:
An Idea Whose Time Has Come

Never before September 11th has the urgency been so great and the stakes so high. The time to reform our nation's immigration system is clearly now.[1] Yet never before have conditions made such an undertaking more perilous. The ideas we advance are not new.[2] Many date back over a decade. Never before have the competing interests been so poignant. Strong criticism has been leveled against the President, the Attorney General and the Department of Justice that legal rights have been curtailed in the aftermath of September 11th.[3] There are those who say the terrorists have won if we abandon the freedoms which characterize the American way of life.[4] Congressmen and Senators (on both sides of the aisle) and legal experts have expressed serious concern that due process rights for noncitizens have been encroached upon.[5] Yet all agree we must take appropriate action. The challenge is to balance all interests to ascertain the most effective, efficient and judicious steps to take.

The National Association of Immigration Judges offers a solution.[6] We advocate the creation of a separate, Executive Branch agency to house the trial-level Immigration Courts and the administrative appeals court, currently called the Board of Immigration Appeals. This solution was first proposed in 1997 by the United States Commission on Immigration Reform, a bipartisan, Congressional study group, which worked years reviewing the immigration system from the perspective of all parties involved.[7] We do not believe it is our role to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service.[8]

The collective expertise of our corps in this complex and highly specialized area of law is unparalleled.[9] Our perspective is non-partisan, and has been forged in the trenches where the battles are being waged. We are firmly convinced that the plan we advocate will go a long way towards achieving the appropriate balance between fundamental fairness and security concerns in these tumultuous times.

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living.[10] When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.[11]

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed.

THE CURRENT STRUCTURE

Congress has delegated authority to the Attorney General to enforce and administer immigration laws through the provisions of the Immigration and Nationality Act (INA).[12] The Attorney General, in turn, has delegated the bulk of that authority to the Commissioner of the INS.[13] However, specific authority for immigration, trial level and appellate administrative review has been delegated by the Attorney General to the Executive Office for Immigration Review (EOIR).[14]

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA).[15] The INS has virutally unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications,[16] others upon de novo review of an INS denial of an application,[17] and still others upon review of whether an INS decision below was based on sufficient evidence.[18] Once in removal proceedings, many respondents are eligible for release on bond.[19] The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.[20]

Many lawyers are surprised to learn that the Administrative Procedure Act of 1946, as amended (APA)[21] does not apply to most proceedings under the INA. Even the United States Supreme Court initially ruled that such hearings were subject to the procedural safeguards of the APA, acknowledging that the purpose of the APA was to eliminate the commingling of prosecutorial and fact-finding functions, because it "not only undermines judicial fairness; it weakens public confidence in that fairness."[22] The Court noted that "this commingling, if objectionable anywhere, would seem to be particularly so in deportation proceedings, where we frequently meet with a voiceless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused."[23] However, when Congress enacted the Immigration and Nationality Act of 1952, it instead provided a specific procedure applicable only to deportation proceedings under §242, distinct from the APA.[24] This congressional choice was upheld by the United States Supreme Court in 1955.[25]

In an effort to ameliorate some concerns, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created.[26] In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.[27] In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals from the INS, creating the EOIR, the agency within the Department of Justice which houses these functions to this day.[28]

CURRENT PROBLEMS

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[29] Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually, employing 221 Immigration Judges in more than 52 locations across the country.[30] It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. Most in our judge corps are aware of the rumor that a Texas Immigration Judge lost his parking space when a District Director became miffed by an adverse decision! Whether true or not, this example serves to illustrate the need for Immigration Judges to be independent of outside influences. More recent examples of equally disturbing encroachments on judicial independence regrettably occur.

In all fairness, the line between administrative, procedural and substantive issues is not always a bright or obvious one. However many disturbing situations persist, and demonstrate that actual conflicts of interest, and the appearance of possible conflicts, continue to arise. Many believe this occurs due to the Immigration Court's placement within the Department of Justice, where it is sometimes referred to as a "Cinderella" because it appears to be dominated by its more powerful older sibling, the INS.

For example, actions taken by the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals, acting on the delegated authority of the Attorney General, have been reversed by the Ninth Circuit Court of Appeals, which declined to find the issue merely an "administrative" matter.[31] "The Creppy and Schmidt issued directives were purportedly temporary and internal, but they did not leave any real discretion to the BIA board members or the immigration judges. Whether or not the directives constituted rules requiring notice and comment, or merely general policy statements, is a question requiring further examination by the district court."[32] Years later, this class action litigation has dragged on because Immigration Judges (and BIA board members) were not allowed to apply their own sound, legal skills in the moment to conditionally grant a case. Instead, the Attorney General froze the process, delaying the bestowing of benefits (or the issuance of deportation orders), to address matters deemed merely "administrative".

The taint of inherent conflict of interest caused by housing the Immigration Court within the DOJ is insidious and pervasive. Rather than follow proper legal procedures and appeal adverse rulings on a case-by-case basis, disgruntled INS prosecutors have resorted to tattle-tale tactics and end-runs.[33] Since many high-level managers at EOIR

had been INS or DOJ employees for years, INS has more than once found a sympathetic ear for its discontent with a particular Immigration Judge's ruling. There is a strong temptation to have cases "administratively" resolved, by an ex-parte phone call to a former colleague or high-ranking administrator, rather than through the appropriate appeals process.[34] Allegations of forum shopping by INS officials and manipulation of venue issues have been documented as well.[35]

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress.[36] However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges. "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing contempt authority for Immigration Judges,"[37] despite the Congressional mandate.

Another recent action demonstrates that this trend continues with equal force. On October 31, 2001, the Attorney General issued an interim rule which insulates INS custody determinations from any IJ review by granting an automatic stay of release on Immigration Judge decisions where the initial bond was set by the Service at $10,000 or

higher.[38] Since the INS is the entity which sets the initial bond amount, this provision guarantees it the ability to prevent an alien's release from custody during the pendency of administrative proceedings, despite the statutory provisions which entitle an alien to a bail re-determination hearing.[39]

Just as this paper was being finalized, another issue arose that reveals both the public perception that due process is not available before Immigration Courts because of their commingling with INS and the reality that INS through DOJ sometimes dictates to EOIR. On January 29, 2002, National Public Radio reported that two local newspapers and the ACLU are filing suit against the DOJ because of its policy of closing Immigration Court hearings. The report noted that while "INS Judges" used to make the decision on a case-by-case basis as to whether a hearing would be closed, an "INS policy" after September 11th has mandated the closing of all hearings where the Department suspected terrorist activity, even where the hearings themselves were on "technical immigration violations." When explaining how this could happen, the report noted that Immigration Judges are employees of the Department of Justice.

When reduced to its simplest form, in the current structure the Attorney General supervises both the prosecutor and the judge in Immigration Court proceedings. One does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged."[40] Indeed, the analysis of legal scholars also supports the notion that the independence of the decisionmaker is perhaps the most crucial component needed to assure fundamental fairness:

> "The reviewing body must not only seem to be, but must in fact be free of command influence. Whether we are talking about an Article I court

> or a corps of ALJs afloat within the executive branch is beside the point... What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees."[41]

THE SOLUTION

In less emotionally charged times, the United States Commission on Immigration Reform (USCIR) concluded, after years of study, that the Immigration Courts and the Board of Immigration Appeals should be taken out of the Department of Justice and given the status of an independent agency in the Executive Branch. The report observed that: "Experience teaches that the review function works best when it is well-insulated from the initial adjudicatory function and when it is conducted by decisionmakers entrusted with the highest degree of independence. Not only is independence in decisionmaking the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review."[42] In arriving at its decision:

> "The Commission was persuaded by the arguments that the review function should be completely independent of the underlying enforcement and benefits adjudication functions and the reviewing officials should not be beholden to the head of any Department. Although the desired independence could be attained by establishing an Article I Immigration Court ... the overall operation of the immigration system requires flexibility and coordination of function, including the review function, by the various agencies in the Executive Branch."[43]

We believe the time has come to adopt the Commission's solution. The primary impetus behind the universal call for INS reorganization is the need to restore accountability to the system.[44] Implementation of our proposal will satisfy this need in

the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the Department of Justice and establishment of an independent and insulated agency[45] for the Immigration Courts and administrative appeals, will create a forum which will provide the needed checks and balances. The DOJ will be freed to focus its mission on the prosecution of those in the United States illegally -- an increasingly compelling focus.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The creation of an Immigration Court which is not a component of the DOJ will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner.[46] In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses.

The traditional reason for maintaining the Immigration Courts within the DOJ no longer has the same force as it did in the1950s, when the current structure of the Immigration and Nationality Act was promulgated.[47] The historical basis for the

establishment of administrative agencies in general was to maximize the existing expertise in a given field, through general, rulemaking authority and specific, case adjudications.[48] "The purpose of the administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal."[49]

While it is indisputable that the expertise of the Immigration Courts is unmatched, the need for the Attorney General (usually through his delegees) to set broad policy based on that expertise has diminished considerably in recent years.[50] In the past decade, for example, Congressional enactments involving immigration matters have provided specific and detailed roadmaps to enforcement, not general goals which require the specialized skill of an agency to provide a methodology to implement or flesh-out.[51] The general trend in the field of administrative law appears to be shifting towards a judicial focus of insuring that Congressional will is implemented, rather than a reliance on agency expertise in interpretation.[52] This is a task which affords far less deference to administrative experience and interpretation, since it focuses instead on a search for Congressional purpose.[53] In any event, such guidance would be available if needed by a Presidentially-appointed Director, who would serve subject to the advice and consent of the U.S. Senate. Such a Director of the newly created agency would be free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives.[54]

THE BENEFITS OF THIS APPROACH

Some would argue that any reform of the current system should place the Immigration Courts under the Administrative Procedure Act (APA).[55] The American Bar Association in 1983 supported legislation to require administrative judges for immigration proceedings to be appointed pursuant to the APA.[56] Others assert that Immigration Courts should be Article I courts, as was done in the fields of tax law and bankruptcy law.[57]

The factors which favor the creation of an administrative agency, an administrative tribunal or an Article I court are the same: to accommodate the need for specialized expertise, to reduce the caseload burdens placed on Article III courts and to encourage legal uniformity.[58] Generally, the major distinction between the APA tribunals and Article I courts is the greater degree of judicial independence which is provided by the latter, due to the insulation of decisionmakers from the agency whose rulings it impacts.[59] Legal experts differ on their views as to how the degree of independence varies between the two types of forums and it is an issue to which a great amount of academic discussion has been devoted.[60]

The suggestions to make Immigration Court proceedings subject to the APA or to create an Article I Immigration Court were studied in depth by the USCIR and rejected.[61] In brief, the APA approach was viewed as unworkable by some, because it requires too much formality, such as discovery and written decisions with findings of fact and conclusions of law in all cases. These aspects of the traditional APA jurisprudence were perceived as interfering with the ability to quickly adjudicate the large volume of cases currently handled by the Immigration Court. Similarly, critics of the Article I

approach predicted a decrease in efficiency and increase in operating costs. We recognize the merits of Article I status, and in fact believe it is an appropriate solution to which we have no objections.[62] However, independent agency status seems a more feasible approach at this time, especially in light of the Commission's recommendations. Moreover, it may well comprise the best of all alternatives, since it would involve a minimum of disruption or restructuring to implement, but would provide a significant amount of additional impartiality and fundamental fairness.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's recommendation to establish an independent Immigration Court as an agency within the Executive Branch. This conclusion was reached after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. Establishment of an independent Immigration Court would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, insulated from any political agenda. And the time for such action is now!

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[1] See, e.g., United States Immigration Law in a World of Terror, Margaret Stock, National Security White Paper, The Federalist Society for Law and Public Policy (2001).

[2] To the contrary, in the early 1980's Congress, in considering immigration reform, discussed removing the deportation and exclusion hearing process entirely from INS. Options raised by members of Congress included converting SIO's to Administrative Law Judges, or even creating an Article I Immigration Court. (The latter idea had been popularized by several law journal articles). The Evolution of the Immigration Court, Chris Grant. In recent years, Congress has introduced at least three bills to convert the Immigration Court to an Article I Court. See United States Immigration Act of 1996, H.R. 4258, 104th Cong. 2d Sess. (1996); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. 2d Sess (1998); and United States Immigration Court Act of 1999, H.R. 185, 106th Cong. 1st Sess. (1999).

[3] See, e.g., "ABA Urges Ashcroft to Kill Order," by George Lardner, Jr., Washington Post, 1/4/02; Eight Weeks in Jail for the Crime of Being from Yemen: Life on Ashcroft's Enemies List," by Carole Bass, The New Haven Advocate, 12/13/01; "Closed Immigration Hearings Criticized as Prejudicial," by William Glaberson, New York Times, 12/7/01; "Cheer Ashcroft On, With a Little Bit of Friendly Oversight," by Alan Charles Raul, L.A. Times, 12/5/01; "Ashcroft Under Fire for U.S. Anti-terrorism Tactics," CNN.com, 12/4/01; " Our Liberty and Freedoms Today: Statement of the American Immigration Layers Association," AILA Washington Update, Volume 5, Number 17, November 30, 2001; "A Familiar Battle Fought and Won," by Robin Toner and Neil A. Lewis, New York Times, 10/26/01; "A Panicky Bill," Washington Post Editorial, 10/26/01; "Proposed Antiterrorism Law Draws Tough Questions," by John Lancaster and Walter Pincus, Washington Post, 9/25/01; "Tightening Immigration Raises Civil Liberties Flag," by Jonathan Peterson and Patrick J. McDonnell, L.A. Times, 9/23/01; "Caution Urged in Terrorism Legislation," by Walter Pincus, Washington Post, 9/21/01; " Civil Rights Lawyers Sound Alarm," by Jason Hoppin, The Recorder 9/21/01; "Immigrants in America: Attack Response is Too Sweeping," Miami Herald Editorial, 9/20/01.

[4] "Crusade Against Due Process," by Ellis Henican, NewsDay Commentary, 12/7/01; "Beware of Creeping Authoritarianism," by Jack M. Balkin, The Detroit News, 12/4/01; "New World Disorder: Assault on America II," by Greg Goldin, L.A.Weekly, 11/30/01; "It Can Happen Here," by Anthony Lewis, New York Times, 12/1/01; "Ashcroft Ignores Lessons of the Last RoundUp," The Salt Lake Tribune Editorial, 12/4/01; "Rough Justice," by Adam Cohen, CNN.com, 12/3/01; "Wake Up America," by Anthony Lewis, New York Times, 11/30/01; "What Price Security?," Newsday Editorial, 11/26/01; "Dispensing with Traditional Justice," by Jacob Sullivan, Washington Times, 11/23/01; "Justice During Wartime," by Jim Oliphant, Legal Times, 11/21/01; "No Carte Blanche in Terror Investigation," GoMemphis.com Editorial, 11/13/01; "U.S. Will Monitor Calls to Lawyers," by George Lardner Jr, Washington Post, 11/9/01; "Feds Monitoring Lawyer Client Calls," by the Associated Press, New York Times, 11/9/01; "In Ashcroft We Trust," by Evan P. Schultz, New Jersey Law Journal, 11/8/01; "Due Process Must Survive," L.A.Times Editorial, 11/6/01; "Is Fear Crushing Freedom?," CBSnews.com, 10/31/01; "With Powers Like These, Can Repression Be Far Behind?," by Robert Scheer, L.A.Times, 10/30/01; "National Security and Citizens' Rights," by Bill Blakemore, ABCnews.com, 10/29/01; "Wage War on Terror, Not on Civil Rights," NewsDay Editorial, 10/28/01; "Don't Sacrifice Liberties to Protect Them," Dan K. Thomasson, Fresno Bee, 9/28/01; "Investigators Should Not Abuse Legal Process," Dallas Morning News Editorial, 10/18/01; "Liberty in a Time of Fear," by David Cole, New York Times, 9/25/01.

[5] "Diplomats Protest Lack of Information," by Barbara Crossette, New York Times, 12/20/01; "Uniformed Lawlessness," by Edward Wasserman, Miami Herald, 12/3/01; "U.S. Defends Anti-terror Tactics," by Kathy Gambrell, Washington Times, 12/2/01; "Rules to Use Military Tribunals Still Being Written by Pentagon Lawyers, Under Pressure to Build In Basic Safeguards," Newsweek, 12/2/01; "With Justice for Some, Not All," by Rogers M. Smith, The Christian Science Monitor, 11/20/01; "On Left and Right, Concern Over Anti-Terrorism Moves," by George Larder Jr, Washington Post, 11/16/01; "Power to Abuse," Miami Herald Editorial, 11/13/01; "An Affront to Democracy," Washington Post Editorial, 11/12/01; "Sen. Leahy, ABA Protest Ashcroft's Monitoring Order," by Helen Dewar, Washington Post, 11/10/01; "Senators Question an Anti-terrorism Proposal," by John Lancaster, Washington Post, 9/26/01.

[6] The National Association of Immigration Judges (NAIJ) is the certified representative and recognized collective bargaining unit which represents the Immigration Judges of the United States. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, an affiliate of AFL-CIO. This paper was prepared by the current President of NAIJ, Judge Dana Marks Keener and Vice President, Judge Denise Noonan Slavin. The opinions expressed here do not purport to represent the views of the United States Department of Justice, the Executive Office for Immigration Review, or the Office of the Chief Immigration Judge. Rather, they represent the formal position of NAIJ, based on the personal opinions of the authors which were formed after extensive consultation with their constituency. To the best of our ability to ascertain, the authors believe this paper represents the clear consensus of the majority of our members.

[7] Unites States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 174 (September 1997)

[8] While we do not dwell on possible reforms affecting the appellate level of administrative review, the Board of Immigration Appeals, we do believe that the current placement of the trial level immigration courts within the same structure as the appellate level administrative court to be appropriate.

[9] Immigration Judges are a diverse corps of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts, and even successful arguments at the United States Supreme Court . Some of us are former INS prosecutors, others former private practitioners. Our ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as ALJs, whose qualifications have been compared with federal district judges. "The calibre of administrative law judges ... is certainly as high as those of federal district judges..." Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

[10] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)

[11] These cases have also been analogized to criminal trials, because fundamental human rights are so involved in these enforcement type proceedings. See, John H. Frye III, "Survey of Non-ALJ Hearing Programs in the Federal Government," 44 Admin. L.Rev. 261, 276 (1992).

[12] 8 U.S.C. §1103.

[13] Id., 8 C.F.R. §2.1.

[14] 8 C.F.R. §§3.0 - 3.65.

[15] For a concise but comprehensive explanation of immigration court proceedings, see Kurzban's Immigration Sourcebook: A Comprehensive Outline and Reference Tool, 7th Ed. 2000, by Ira J. Kurzban.

[16] One example of this is cancellation of removal for nonpermanent residents under §240A(b) of the INA.

[17] Asylum applications under §208 can be initially filed with the INS. If the application is not granted, it is referred to the Immigration Court for a de novo determination of eligibility.

[18] When the INS determines that a conditional permanent resident who obtained that status through his marriage is not entitled to have the condition removed, the standard for review in the Immigration Court is whether the INS decision is based on substantial evidence. 8 U.S. C. §1186(b)(1).

[19] 8 U.S.C. §1226(a).

[20] 8 C.F.R. §3.19.

[21] 5 U.S.C. §551, et seq.

[22] See Wong Yong Sung v. McGrath, 339 U.S. 33, 42 (1950), citing the 1937 report of the President's Committee on Administrative Management considered by Congress in enacting the APA.

[23] Id. at 46.

[24] However, the APA provisions for rulemaking are nonetheless applicable to EOIR it its rulemaking capacity, and Administrative Law Judges subject to APA rules preside over employer sanction matters and discrimination cases in the Office of the Chief Administrative Hearings Officer (OCAHO), which is by far the smallest component of EOIR.

[25] Marcello v. Bonds, 349 U.S. 302 (1955)

[26] From Wong Yang Sung to Black Robes, Sidney B. Rawitz, Vol 65 Interpreter Releases No. 17 (May 2, 1988) at 458.

[27] 8 CF.R. §1.1(1)(1973); Rawitz at 48.

[28] See, e.g., Rawitz at 458-459; Education and Training Series, Major Issues in Immigration Law, A Report to the Federal Judicial Center, 1987, David A. Martin; The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens.

[29] Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001)

[30] See, "In the Spotlight: The Honorable Michael J. Creppy, Chief Immigration Judge of the United States" in Lateral Attorney Recruitment, Office of Attorney Recruitment and Management, U.S. Department of Justice.

[31] Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999)

[32] Id. at 1235.

[33] An Immigration Judge in York, Pennsylvania ,was trumped in his decision to remove a case from the docket over the objection of the INS through an administrative closure order when the local Court Administrator, under orders from the Chief Immigration Judge, ignored the ruling and placed the matter back on calendar. See "Immigration Judge Criticizes Intervention into Deportation Case," Siskind's Immigration Bulletin, June 29, 2001; "Two Judges Do Battle in Immigration Case" by Eric Schmitt, New York Times, 6/21/01.

[34] "Judge's High Caseload" by Frederic Tulsky, San Jose Mercury News, 10/17/00 (describing an accidentally recorded *ex parte* telephone conversation between an Immigration Judge, who was a former INS employee, and an INS trial attorney regarding the merits of a pending case).

[35] See Xiao v. Reno, 837 F.Supp. 1506, 1539-1541(discussing allegations of forum shopping); "Misconduct Alleged in Heroin Smuggling Case," by Jim Doyle, San Francisco Chronicle, 11/24/92; "INS Transfer Procedures Making a Mockery of Detainee Rights," by Robyn Blumner, Salt Lake Tribune, 1/4/02; Committee of Central American Refugees, et al. v. INS, et al., 795 F.2d 1434 (9th Cir. 1986); see also, Committee of Central American Refugees, et al. v. INS, et al., 807 F.2d 769 (9th Cir. 1987).

[36] See §240(b)(1) of the INA, as amended by §304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

[37] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens, at page 109, n.313.

[38] 66 Fed. Reg. 54909 (10-31-01)

[39] Testimony of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law, at the Hearing Before the Immigration and Claims Judiciary Committee, House of Representatives, December 19, 2001.

[40] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens at 100 - 105 (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly 1/4 (22%) indicated that the close personal relationships

between employees of the INS and the Immigration Courts were a factor in their conclusion that the Immigration Courts were not separate from the INS)

[41] Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 878 (Winter, 1995).

[42] Unites States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 175 (September 1997)(emphasis added).

[43] Id. at 179.

[44] The cries for accountability in recent months have been virtually deafening. See, e.g.,:"Secret Evidence Invites Abuse," Red Bluff Daily News Editorial, 1/9/02; "Questions Raised About Detainees," by Mae M. Cheng, NewsDay, 12/7/01; "U.S. Has Overstated Terrorist Arrests for Years," by Mark Fazlollah and Peter Nicholas, Miami Herald, 12/14/01; "Secret Justice: Ashcroft Orders Closed Courts," by Josh Gerstein, ABCnews.com, 11/28/01; "Ashcroft Offers Accounting of 641 Charged or Held - Names 93" by Neil Lewis and Don Van Natta Jr, New York Times, 11/28/01; "Analysis- Ashcroft Does an About-Face on Detainees," by Todd S. Purdum, New York Times, 11/28/01; "INS Can Overrule Judges' Orders to Release Jailed Immigrants," by David Firestone, New York Times, 11/28/01; "Cases Closed," by Josh Gerstein, ABCnews.com, 11/19/01; "US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists," by Jess Bravin, The Wall Street Journal, 11/15/01; "INS to Stop Issuing Detention Tallies," by Amy Goldstein and Dan Eggen, Washington Post, 11/9/01; "Count of Released Detainees is Hard to Pin Down," by Dan Eggen and Susan Schmidt, Washington Post, 11/6/01; "Justice Department Cannot Confirm How Many Detainees Released," by Terry Frieden, CNN.com, 11/6/01; "Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate," by Christopher Drew and William Rashbaum, New York Times, 114/3/01; "U.S. Holds Hundreds in Terror Probes; Who Are They?," by Chris Mondics, The Record, 11/3/01; "Detentions After Attacks Pass 1000, U.S. Says," by Neil A. Lewis, New York Times, 10/30/01; "Detention and Accountability," New York Times Editorial, 10/19/01; "A Need for Sunlight," Washington Post Editorial, 10/17/01.

[45] Similarly, the impetus for the creation of the Tax Court "was, in large measure, the desire to provide a forum for review of administrative action that was unfettered by agency control." Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 871 (Winter, 1995)

[46] See footnote 43, supra.

[47] For a general discussion of how the current structure succeeds in part (and falls short in others) in providing optimal due process safeguards in various decisional contexts, see "A Study of Immigration Procedures" by Paul Verkuil, 31 UCLA L. Rev. 1141 (August, 1984).

[48] See, 2 Am. Jur. Adm. Law. §24, et seq.

[49] Cromwell v. Benson, 285 U.S. 22, 88 (1932).

[50] Since EOIR became a separate agency within the DOJ on January 9, 1983, the Board of Immigration Appeals has published 525 precedent decisions. Only seven of those decisions were reviewed by the Attorney General during that time. See Matter of N-J-B-, 21 I&N Dec. 812 (AG 7/9/97); Matter of Soriano, 21 I&N Dec. 516 (AG 2/21/97); Matter of Farias-Mendoza, 21 I&N Dec. 269 (AG 3/27/97); Matter of Cazares-Alvarez, 21 I&N Dec. 188 (AG 6/29/97); Matter of De Leon-Ruiz, 21 I&N Dec. 154 (AG 6/29/97); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (AG 3/18/91); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (AG 7/27/84).

[51] See, e.g., Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. Law 104-132, 110 Stat. 279 (Apr. 24, 19960; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[52] Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 916-7 (1988) (arguing that in order for administrative agencies to pass constitutional muster in their provision of justice they must be subject to appellate review by an Article III court); "See also. United States v. Mead, 121 S.Ct. 2164 (2001); William Funk, One of the Most Significant Opinions Ever Rendered?, 27 Fall Admin. & Reg. L. News 8.

[53] As an independent agency, the President would be free, subject to the advice and consent of the Senate, to appoint a Director who would have only the single task of assuring the efficient and fair administrative review of immigration decisions. See United States Commission on Immigration Reform, 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 180 (September 1997)

[54] This would then remove the Attorney General from the dilemma which has been the most frequently attributed cause for the dsyfunction of the INS: conflicting priorities between enforcement and adjudications goals.

[55] See, Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 864 (Winter, 1995) ("It should be emphasized that some regard ALJs --- and by implication, Article I judges, but not AJs --- as imbued with the essential elements of judicial independence.")

[56] American Bar Association, Policy/Procedures Handbook at page 294. See also, Recommendations of the Administrative Conference of the United States, The Federal Administrative Judiciary, 1 C.F.R. 305.92-7 (1992) ("The Conference's general view is that the movement away from uniformity of qualifications, procedures and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate."); see also, Paul R. Verkuil, Reflections Upon the Federal Administrative Judiciary, 39 UCLA L.Rev. 1341, 1358-1359, 1361 ("The argument for ALJs would be strongest in situations were individual liberty is at stake and weaker where the disbursing of of government benefits is involved. On this scale, the use of ALJs in the immigration context takes on heightened importance..." Id. at 1362-1363.)

[57] See, Isabel Medina, Judicial Review - A Nice Thing? Article III, Separation of Powers and IIRIRA of 1996, 29 Conn. L. Rev. 1525 (1998); Maurice Roberts, Proposed: A Specialized Immigration Court, 18 San Diego L.Rev. 8, (1980); Leon Wildes, The Need for a Specialized Immigration Court: A Practical Response, 18 San Diego L. Rev. 53 (1980).

[58] Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts under Article III, 65 Ind. L. J. 233; Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197 (April 1983).

[59] Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863 (Winter, 1995)

[60] See footnotes 50, 55 and 56, supra.

[61] Unites States Commission on Immigration Reform , 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 179 (September 1997)

[62] We do, of course, strongly believe that any legislative conversion to Article I status must include a provision which would "grandfather" our current Immigration Judge corps. See note 9, infra.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
June 26, 2002

CONTACT: Stephanie Cutter
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE SENATE JUDICIARY IMMIGRATION SUBCOMMITTEE HEARING ON IMMIGRATION REFORM AND THE REORGANIZATION OF HOMELAND DEFENSE

Today, our subcommittee considers the many immigration issues related to homeland security reform. Immigration is a central part of our heritage and history -- it is essential to who we are as Americans. Continued immigration is part of our national well-being and our strength in today's world. In defending the nation, we cannot lose sight of our tradition as a nation of immigrants and a safe haven for the oppressed.

The Administration's proposal to include the Immigration and Naturalization Service in the new Department of Homeland Security raises serious concerns about the consequences for immigration law and policy, and the adjudication of immigration services and benefits.

Reorganization may help, in some instances, to improve lines of command, but it is not a panacea. A reshuffling of agencies that fails to address such fundamental problems as poor information sharing, inefficient management structures, and insufficient resources will do little to improve security for the American people.

This is particularly true for the Immigration and Naturalization Service, which has long been plagued with problems. Simply including immigration functions in a new, larger department – without instituting essential reforms – will not solve the agency's problems and will not enhance our security. Simply put, reorganization without reform will not work.

I have been working with Senator Brownback and others in this Subcommittee to examine ways to restructure the INS and bring our immigration system into the 21st century. Toward that end, we held a hearing last month, and Senator Brownback and I have introduced comprehensive legislation to reform the agency and provide a more effective and efficient framework to meet our immigration responsibilities.

Our bipartisan bill would untangle the overlapping and often confusing organizational structure of the INS and replace it with two clear chains of command – one for enforcement and the other for services. Both functions have long suffered under the current structure. Separating these competing responsibilities will provide greater accountability, efficiency, and clarity of purpose.

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On the enforcement side, it's clear that our immigration laws are being applied inconsistently. Some of the September 11th terrorists were here legally, others had overstayed their visas, and the status of others is still unknown. Improving the structure of the agency will help ensure greater accountability and consistent and effective enforcement of our immigration laws.

Immigration services are also suffering. Massive backlogs force individuals to languish for years waiting for their naturalization and permanent resident applications to be processed. Files are lost. Fingerprints go stale. Courteous behavior is too often the exception, rather than the rule. Application fees continue to increase – yet poor service and long delays continue as well.

As important as it is to separate these functions, adequate coordination between the two branches of INS is also critical. Almost every immigration-related action involves both enforcement and service components. Our bill would establish a strong, shared, central authority over the two branches to provide a more uniform immigration policy, more efficient interaction between the two branches, and greater fiscal responsibility.

With respect to the Administration's, proposal, I am concerned about moving immigration service functions, such as naturalization and asylum and refugee adjudications, into a new department that has as its principal mission preventing terrorism. We must do all we can to increase and improve layers of security to identify and apprehend potentially dangerous persons. But, we must also safeguard the entry of the 31 million persons who enter the U.S. legally each year as visitors, students, and temporary workers, the 550 million who legally cross our borders each year to visit family and friends, and the refugees who deserve our protection.

It will be difficult, however, to transfer the enforcement functions of the INS to the Department of Homeland Security, and leave the service functions of the INS in the Department of Justice. Under this scenario, the service functions, already the step-child of the INS, will be further neglected and weakened. In order to protect these very important service functions, it may be better to transfer all of INS to Homeland Security, but raise the status of immigration in that agency.

Under the President's plan, immigration is located in one of four divisions, the "Border and Transportation Security" division, which gives little recognition to the need for close ties between the service and enforcement functions. To remedy this problem, a fifth division, "Immigration Affairs," could be created that would contain bureaus of enforcement and immigration services, set up along the lines of our proposed legislation. This option would ensure better coordination between services and enforcement, institute much needed reforms in the INS, and place services in a position where they could be a more equal partner in the mission.

In any scenario, an Office of Juvenile Affairs, as proposed in our legislation, should still be created, but it should not be placed in Homeland Security. Perhaps the best place for this office is in the Department of Health and Human Services, in the Office of Refugee Resettlement, which already handles refugee children. This plan makes sense, since this office will only handle issues on the custody and care of unaccompanied minor children, an area with no national security ramifications. If INS is transferred intact, it makes little sense to establish an Office of Juvenile Affairs in the Department of Justice.

Another significant problem in the Administration's proposal is that the new department

would incorporate the Executive Office for Immigration Review – the immigration court system. This office is currently part of the Department of Justice but it was moved out of INS to enhance its independence and integrity. Support has been growing to move this office out of the Department of Justice altogether and create an independent agency to oversee this important function.

Moving the review office into the Homeland Security Department would not enhance our security. Out of the quarter million cases handled by EOIR each year, only a few deal with security-related issues, and they have been handled well by the office. Moving this office into a new security department would undermine its ability to independently hear and decide important immigration matters. As we move to strengthen our security, there is no reason to sacrifice the fair and just review of immigration proceedings.

The Administration's proposal would also move the Department of State's visa issuance function to the new Homeland Security Department, despite the fact that many studies conducted over the years have concluded that the State Department is the appropriate agency to handle these responsibilities. Visa issuance is directly tied to U.S. foreign relations. Consular officers are trained as diplomats to represent the U.S., and the manner in which they fulfill those duties can have a significant impact on our relations with foreign countries. As foreign service officers, they are well equipped to address complex visa issues – which are at the top of our foreign policy agenda in many countries.

The recently enacted Border Security and Enhanced Visa Reform Act requires our law enforcement and intelligence agencies to share critical information with the State Department, so that consular officers responsible for screening visa applicants will have the tools they need to make informed decisions. With accurate and timely information, the State Department is well-equipped to continue to handle the issuance of visas.

I look forward to working with the Administration and my colleagues to see that the current reorganization deals effectively with these important issues. It is essential that we provide a strong framework for meeting security concerns, but we can do so while continuing to our proud tradition of immigration. I thank the witnesses for being with us, and I look forward to their testimony.

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Immigration and the Organization of the Homeland Security Department

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Hearing Before the Subcommittee on Immigration
Senate Committee on the Judiciary
June 26, 2002

Mr. Chairman and Members of the Committee: I appreciate the invitation to appear before you to discuss a vitally important topic. Serious planning for reorganization of the government's immigration management function was well under way at the end of 1997 when I left office as General Counsel of the Immigration and Naturalization Service (INS) to return to teaching. It is most unfortunate that we are still debating and not implementing, after nearly five years of discussion, and despite wide agreement on the basic contours of the needed reorganization. The lingering uncertainty has damaged INS staff morale, caused some highly capable people to leave the agency, and hampered other sorts of reforms. Now, of course, President Bush's proposal for a new Homeland Security Department has introduced an additional complication into the discussion -- just as it appeared that we were on the threshold of enacting a law that would have permitted reorganization within the Department of Justice (DOJ) to begin in earnest. Despite this, I hope the Congress can settle the basic structural decisions soon so that we can move on into the implementation phase.

I. The Limits of Reorganization Remedies

Reorganization has almost always been oversold as a solution to operational, management, and policy problems. Professor Harold Seidman once observed that these kinds of restructuring initiatives are the "twentieth century equivalent of the medieval search for the philosopher's stone. . . . If only we can find the right formula for coordination, we can reconcile the irreconcilable, harmonize competing and wholly divergent interests, overcome irrationalities in our government structures and make hard policy choices to which no one will dissent."[1]

His characterization of inflated and unrealistic expectations applies fully to much of the rhetoric that has surrounded INS reorganization, and I fear it will prove the same with the new

[1]H. Seidman & R. Gilmour, *Politics, Position, and Power* 219 (4th ed. 1986).

Department of Homeland Security. It seems that we often veer off into debates over organization when we cannot quite bring ourselves to face difficult policy choices squarely or cannot achieve the clarity of mission or resource commitments that are usually far more important. Whatever may be true of organization for homeland security generally, I am convinced that the most important fixes for many of the problems of our immigration system will stem not from reorganization but from smaller scale and less showy changes. Real improvements must derive from patient, detailed work that addresses specific functions one by one, identifies weaknesses, thinks hard about competing solutions, selects one, and maps out a long-term plan to make sure the change is well-implemented on the ground. Too often, reorganization talk becomes a way of changing the public focus and postponing difficult decisions. At the very least, reorganization, especially on the scale contemplated for the Homeland Security Department, will divert energies and postpone this more productive micro-focus on specific improvements.

The timing of the current Homeland Security proposal, which would move the immigration function to a new and untried department, is at least ironic. Immigration was long a neglected stepchild within the Department of Justice, but that situation had been turned around over the last decade. Attorneys General were getting the hang of paying close attention to immigration, of understanding its importance not only to law enforcement but also to America's flourishing -- to making us the diverse, vibrant community we are and want to remain. I fear that immigration will become a stepchild anew in the new department -- although I offer recommendations later that may help avoid that outcome.

II. Guiding Principles

Based on my twenty-odd years of teaching and writing about immigration, interspersed with government service in the Departments of State and Justice, I suggest here a few key points that should be kept in mind as the Congress hammers out the details for implementing the reorganization of the immigration function. I then turn to a few more specific recommendations.

1. Immigration is about more than just enforcement and dangers. The attacks of September 11 reminded us all about the shortcomings of our immigration enforcement system and the dangers that some migrants can pose for our country. That is a vital lesson, and I hope it will help invigorate sensible, resolute immigration enforcement -- not only those elements of enforcement directed at national security dangers, but also the more routine enforcement against those who have not honored our laws and have no legitimate defense or excuse for their actions. Widespread violations, even though most of the violators are hard-working and benign, erode respect for the rule of law. They create a climate, including the widespread use of false identification, that makes it harder to protect against that small minority of illegal migrants who are involved in criminal or terrorist actions.

But having said that, I want to emphasize that immigration policy is not just about guarding against dangers and violations. We are truly a land of immigrants, and this country has benefited enormously, enriching our arts, our culture, our cuisine, and our economy in the process. Our immigration policy also makes a vital contribution to the protection of the world's

refugees. Indeed, it is a singular shame that the one slice of permanent immigration most sharply affected by September 11 appears to be refugee admissions -- suspended for several months and not yet back up to the needed pace of entries. Whatever reorganization plan the nation adopts, we have to restore our historic position as a leader in refugee resettlement. Moreover, we must not let the fears unleashed by the September attacks diminish the human bridges to other nations that immigration provides -- through those who come both for temporary visits and for permanent resettlement. Immigration policy serves to reunite families, to enrich our schools and colleges, to educate visitors on the realities of American life (thereby puncturing distorted pictures that our enemies spread), to educate Americans about the rest of the world, to win us friends in other countries and their governments, and to serve our historic humanitarian objectives.

Losing sight of the positive side of immigration, of its richness and value, may be the greatest risk posed by placing the immigration function in a new Department named Homeland Security.

2. Keep immigration services and enforcement closely linked. Most INS reform proposals have focused on dividing immigration enforcement (carried out by such units as the Border Patrol, investigations, detention and removal, and intelligence) from immigration services (the approval of applications and petitions filed by would-be migrants or citizens or their sponsors -- sometimes called adjudications or benefits). Indeed there has been widespread agreement for several years on some such split as the central component of INS reorganization plans. Both the Sensenbrenner-Conyers bill (H.R. 3231) and the Kennedy-Brownback bill (S. 2444) employ this framework, as did the Bush Administration's initial INS restructuring plan. Many have supported this scheme as a way of assuring that the services component is given adequate attention and resources. And reorganizing INS along these lines held modest promise for relocating field offices and consolidating lines of authority in ways that could help change the agency culture and reduce the risk that district offices act like separate fiefdoms with their own divergent approaches.

But as the INS reorganization debate has proceeded, more and more people have come to realize the potential disadvantages of a too-rigid split between enforcement and adjudication. Before the President's announcement on June 6 of his new Homeland Security reorganization

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[2]I have elsewhere expanded on the case for close linkages between immigration benefit decisions and enforcement information -- a lesson we should have learned from the problems in the naturalization program a few years ago and from the incident in March 2002 when the notification of Mohammed Atta's visa approval was mailed to the airline school in Florida. Both problems derived from insufficient use of enforcement information in a benefit program. Martin, *Fixing INS?: Congress Should Take Some Blame for Our Immigration Woes*, Legal Times, Apr. 29, 2002, at 51; *Why Split the INS?: Immigration Services and Enforcement Must Be Linked,*

proposal, much of the most recent commentary focused on the need to assure that the two components are efficiently linked and always work closely together.[2] The Kennedy-Brownback bill, in my view, would do a better job than the House-passed bill in honoring this imperative. It provides a better staffing arrangement for the director of its new Immigration Affairs Agency (including a single General Counsel's office) than is specified for the comparable official (an Associate Attorney General) under H.R. 3231. It also provides a wider range of authority for the director, including clearer chains of command, thereby creating a far better institutional home for functions that inevitably must be shared or closely coordinated between enforcement and services.

Unfortunately, the prospective move of immigration functions to Homeland Security has revived some of the old discussion about a more complete split -- perhaps leaving immigration services in the Justice Department and moving immigration enforcement (or some segment of it, such as the Border Patrol) to the new Department. I understand the impulse behind that thought. As indicated under principle 1, there is a genuine risk that the services side of immigration management will be diminished as a result of the Homeland Security reorganization. The theory would be that leaving services in a different department could help avoid that outcome.

In my view, however, that theory would not be realized in practice. Such a split would almost surely leave services even weaker than placing them in Homeland Security. Moreover, it would bring in its train other considerable disadvantages by splitting up what really should be considered a single package of immigration management, encompassing both services and enforcement. The immigration function should remain unified, but a few revisions to the President's plan can better honor the positive features of immigration and sustain recognition of the importance of adjudications.

Why not a more complete split? Services obviously should not be provided to persons who are disqualified; very often the relevant information concerning the disqualification will have been developed through immigration enforcement efforts. Although it is certainly possible to develop cooperation and information-sharing arrangements across agencies and with diverse departments (INS has done so for decades with the Departments of State and Labor, and with other components of the Department of Justice), such cooperation works better when it takes place within the same agency. Most significantly, we are now in a phase of our national life where all immigration benefits will be conditioned on some form of screening against enforcement-related information -- whether a name check against a lookout database or a demand for fingerprints or a detailed interview. To leave immigration services as a vestigial unit in the Justice Department (or perhaps some other department besides Homeland Security) is to make it hostage to decisions on funding and priorities made primarily in other venues. Timely provision of such information to immigration adjudicators could easily suffer, and securing a remedy for

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Legal Times, Sept. 6, 1999, at 21.

the delays might well require mobilizing one Cabinet-level official to take up the matter with another such official. It seems unlikely that the services unit, if left standing solo, will be able to place a high-priority claim on the time of a Cabinet officer. Immigration services are more likely to have the bureaucratic clout they need if they remain as part of an overall immigration function kept together in the same department.

I also fear that a wholly separated immigration services bureau would fall under a constant cloud of suspicion that it was insufficiently attentive to security concerns in its decisions. Such a reaction could affect both funding and ongoing congressional and public support. Although I hope we can develop a system where adjudications are entirely funded from fees at a level that assures timely decisionmaking, I suspect that additional funding will often be necessary. If so, services are more likely to claim that kind of support and attention if they remain in the same department with immigration enforcement.

For all these reasons, if the immigration function, as a whole, cannot remain in Justice (some move now appears overwhelmingly likely), then it is far better to transfer all functions together to the new Department, provided that the Department itself is properly structured to counter the real risk that immigration services will be neglected.

3. Immigration deserves ongoing attention from the highest levels of government. As I mentioned earlier, the last decade has seen considerable gains in the salience of immigration policy. On the positive side, immigration is a vitally important part of our national tradition and a key to many of our country's successes. On the negative side, neglecting immigration functions leaves us vulnerable to intense dangers from terrorists as well as a more subtle erosion of sound governance and respect for the rule of law. Moreover, immigration, the movement of people, is sensitive in a way that movement of cargo will never be. Family hopes and expectations rest on immigration; immigration policy can either facilitate or thwart the development of effective business plans in a globalized economy; and we must never forget that immigration policy also makes way for vital humanitarian initiatives, primarily through refugee resettlement. Regulation, management, and sometimes facilitation of human migration therefore calls for a very different mix of skills, techniques, and orientation than are needed in the other units projected for the Border and Transportation Security Division of the Homeland Security Department.

Further, we need to structure any agency with immigration responsibilities so that immigration issues receive attention from the highest levels of government whenever the need

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[3]This point is emphasized in the study of restructuring proposals chartered by the Carnegie Endowment for International Peace: D. Papademetriou, T.A. Aleinikoff, & D. Meyers, *Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability* (1998).

arises.[3] The bill recently passed by the House recognized this level of priority by elevating the head of the immigration function to the rank of Associate Attorney General, meant to be one of the top four or five officers in one of the most powerful of Cabinet departments. The Homeland Security proposal of the President would reverse this useful trend. Immigration would become just one of six components in the Border and Transportation Security Division. Presumably the head or heads of immigration would report to an undersecretary, who would in turn report to a Cabinet secretary. That placement is a step in the wrong direction in a new century when immigration issues are likely only to increase in importance.

III. Recommended Solution: an Undersecretary for Immigration Affairs in the Department of Homeland Security

Given the momentum generated by the proposal to create a Department of Homeland Security, the best way to serve all the values identified above is to keep the full immigration function in that Department but to alter the structure. In my view, the immigration function should be placed in a separate, fifth division of the Department, under an undersecretary for immigration affairs. Immigration is sufficiently important, both to enforcement and to the human values and cultural and economic successes that characterize this land of immigration, that it merits such a structure.

An undersecretary who can focus solely on immigration is far more likely to keep in mind the full richness of this area of public policy -- and hence to assure sufficient priority for the services side of the house -- than is an undersecretary who must also focus on the demands, largely enforcement-related, of five other components. When particular needs arise in the immigration services realm, they are more likely to be addressed by an immigration undersecretary -- and to be raised to the level of the secretary if needed -- than would be the case with a residual services unit left behind in Justice. Moreover, this official, with a range of authorities similar to those given the director under the Kennedy-Brownback bill, can craft and oversee ongoing coordination between enforcement and services, and can assure the public that

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[3]This point is emphasized in the study of restructuring proposals chartered by the Carnegie Endowment for International Peace: D. Papademetriou, T.A. Aleinikoff, & D. Meyers, *Reorganizing the U.S. Immigration Function: Toward a New Framework for Accountability* (1998).

[4]The most important point here is to create a separate Division of Immigration Affairs, headed by an Undersecretary, within the Department of Homeland Security, for unified placement of all immigration management functions. Internal organization of this division, however, could profitably follow one of several alternate models. Therefore it could readily work if there were a director of immigration affairs, reporting to the undersecretary, who would be the central operational officer overseeing the two principal bureaus (services and enforcement) -- paralleling the structure of the Kennedy-Brownback bill -- if that is seen as superior to having

immigration benefits are not being extended without adequate screening and appropriate attention to security risks.[4]

Such a restructuring of the President's proposal would not undercut the principal benefits claimed for the original Homeland Security plan. Although the new Department would have five divisions instead of the original four, this separation is justified by the unique challenges that arise in the management of the movement of human beings. Nearly all of the benefits to coordination that were expected from moving immigration, along with Customs, Transportation Security, the Animal and Plant Inspection Service, the Federal Protection Service, and the Coast Guard into the same division can still be realized, because all of these units remain within the same Homeland Security Department.

A fifth division would also bring better balance among the divisions of the new Department. Under the Bush plan, the Border and Transportation Security Division (including immigration) would be a behemoth, involving 156,000 employees (over 90 percent of the department staff) operating under current budgets totaling nearly $24 billion. The other three components combined would have 13,000 employees and a budget of $14 billion. Splitting off immigration would create a fifth division with a budget of at least the current $6.4 billion, with staffing of over 39,000 -- plenty to justify a separate unit. But size itself is not the cornerstone of the case for a separate Immigration Affairs Division. Instead such a change primarily serves to recognize the unique challenges posed by and the unique values that derive from immigration policy.

Considering a different alternative. I have already indicated why I consider this arrangement superior to a plan that would keep immigration services in Justice while moving all immigration enforcement to Homeland Security. But I should say a word about its superiority to another alternative that is reflected in the Hart-Rudman Commission's recommendations and has found its way into some recent legislative proposals. That is the idea of moving only the Border Patrol, but not the rest of immigration enforcement (nor services), to Homeland Security.

Such a move would be a mistake. The Border Patrol's work is more closely linked with the rest of immigration enforcement (as well as other immigration functions) than the Hart-Rudman proposal acknowledged, and to split it off alone would bring far greater obstacles to effective coordination than any gains one might expect from placing the Patrol in the same Department as the Coast Guard and Customs. Take an example that demonstrates these linkages. As the Border Patrol's effectiveness along the southwest border increased throughout the 1990s through the increased use of forward deployment (including Operations Hold the Line and

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the bureaus report directly to the undersecretary. The use of such an intermediate officer would make the most sense if the undersecretary also has under his or her authority a separate unit for visa services, as well as the Executive Office for Immigration Review, as discussed below.

Gatekeeper), we saw a real change in the kind of challenges faced in the ports of entry, staffed not by the Border Patrol but by the Inspections division of INS. The new Border Patrol strategy thwarted smugglers who formerly guided people across relatively unpoliced stretches of the border. But the smugglers did not simply go out of business. They responded to the new strategy by promoting or facilitating fraudulent claims in the ports of entry, and through more sophisticated concealment and transportation schemes for those who still made it through.

Smugglers (and no doubt terrorists) continually respond to enforcement changes through new strategies of their own, which must be met, in turn, by new moves from the US government. All parts of the immigration management system, and not simply the Border Patrol, must be mobilized in this process. The response must include classic service or adjudication functions, which may find themselves challenged with more sophisticated fraud or manipulation, and must certainly include the inspection function, which partakes of both adjudication and enforcement. Border enforcement, in short, is intimately linked with interior enforcement as well as with immigration services. Its departmental placement should reflect that reality. The Border Patrol should be kept together with all other elements of the immigration function.

IV. Further Issues

The visa function. It is not clear from the accounts I have seen or from the skeletal legislative package just what is intended for the visa screening and issuance function under the Bush Administration's proposal. If we are going to undertake major restructuring of immigration functions, we have to examine *all* components of the process. The issuance and denial of visas really constitute the first line of border protection. Although cooperation between INS and State's Consular Affairs Bureau has worked reasonably well, there is a strong case to be made to place this function together with other immigration components in Homeland Security, while still recognizing some of the unique needs and competencies involved. The case for such a transfer is particularly strong if Congress alters the package, as I have recommended, to create a separate Immigration Affairs Division headed by an undersecretary.

EOIR. The Executive Office for Immigration Review consists of the Board of Immigration Appeals (BIA), the immigration judges, and a small number of administrative law judges (who deal with specialized immigration-related cases, mainly employer sanctions). EOIR handles highly formalized adjudications with high stakes, notably removal cases and related questions (such as bond redetermination). Where this component should be located poses some special challenges.

I disagree with those who call for EOIR to be made a separate and independent adjudicative agency. Although it is vital that the judges and Board members retain complete insulation and independence in their decisions on individual cases, a sound immigration control system requires that they be managerially linked with the rest of the immigration function. For example, sometimes immigration judges need to be deployed on a priority basis, along with other immigration management resources, to an area experiencing a sudden migration influx. Such an episode occurred in South Texas in 1988, and the speedy creation of additional court capacity

there helped resolve many deportation cases quickly and thereby sent a needed deterrent message. Contingency planning exercises in which I participated during my tenure as INS General Counsel in the 1990s always included potential arrangements for deployment of immigration judges to the temporary facilities, perhaps operated in tents or other hastily erected shelters. Although it is not impossible to do such planning or deployment across department or agency lines, deployment is much more likely to be successful -- and swift -- if such managerial and logistical decisions can be made by the same official at the head of both chains of command. And in the immigration business, speedy reaction may prove essential in keeping a minor situation from turning into a major crisis. That kind of managerial authority at the cabinet or undersecretary level can be provided in a way that is wholly consistent with independence in deciding individual cases.

I recommend transferring EOIR, like other immigration components, to the Department of Homeland Security. There the director of EOIR should report to the Undersecretary for Immigration Affairs, but individual immigration judges and BIA members would retain all current guarantees of independence in making decisions in individual cases. Congress might also profitably consider additional measures to bolster that independence, but in a framework that recognizes the managerial and logistical linkages.

"Referral" of BIA decisions. Although this issue is a difficult one, it probably makes sense for the Secretary or Undersecretary of Homeland Security to have the authority to hear what amount to appeals or plenary rehearings from the decisions of the BIA, under the infrequently invoked "referral" authority that now appears in 8 C.F.R. § 3.1(h). Under that regulation, BIA cases are now referred to the Attorney General in three circumstances: when requested by the INS Commissioner, when requested by the BIA majority or its chairman, or upon the Attorney General's own direction. Sparingly used (an average of once or twice a year), this procedure has historically been a useful device to assure development of the law in accord with the Attorney General's broad responsibilities in the field of immigration. The immigration laws, detailed as they are, inevitably leave room for interpretive and policy discretion. Because immigration management is often closely connected with foreign policy and other broad vistas of national policy, as September 11 reminded us, the final responsibility for exercising that discretion should rest with a high-level and publicly accountable official who sees more of the policy horizon than does the BIA. Referral to the Attorney General has provided such a mechanism. At the same time, the AG's exercise of that carefully structured authority has always been subject to judicial review -- an important safeguard to assure that the decision truly remains within the bounds of discretion set by statutory and constitutional law.

Such a procedure should not be seen as interference with the decisional independence of the Board -- any more than an authoritative ruling by the Supreme Court is considered to impair the independence of trial judges. The judges must henceforth follow the doctrine propounded in the precedent decision, but they are certainly under no obligation to take phone calls from the Chief Justice directing the outcome in individual cases. Referral similarly follows a highly structured and formalized path that preserves the insulation of the Board and the immigration judges and disciplines the intervention of the Attorney General. It results in a detailed, public,

quasi-judicial decision, with a full statement of reasons justifying the result and giving guidance for future cases. And as indicated, it remains subject to judicial correction.

I therefore believe that referral should be retained, but it may require some special arrangements. If EOIR is moved from Justice to Homeland Security (as is preferable if the rest of the immigration function is transferred), then referral should no longer go to the AG but should instead go to the equivalent official in Homeland Security. Whether that would be the Cabinet Secretary or the Undersecretary is probably less important than assuring high-level, high-competence legal advice and support when a referral occurs. That legal advice should not come from the General Counsel's office that normally handles the legal business of the enforcement and services bureaus, nor probably from the comparable office at EOIR. It might make sense to retain the services of the Office of Legal Counsel in the Department of Justice (which has historically played this limited advisory and support role in referrals to the AG), but perhaps the office of counsel to the Secretary of Homeland Security could perform this specialized and infrequent function instead.

V. Final Recommendations

Reorganization is upon us, and it is vital to structure it in a way that is true to the unique complexities and unique values inherent in immigration policy. I close with two final thoughts that are meant to help keep reorganization in perspective.

1. We need fewer studies and audits, and more capacity to implement the reports generated by past studies of flaws in our immigration system. Numerous studies, by the General Accounting Office (GAO), the DOJ Inspector General (IG), and by outside consultants and scholars, have documented weaknesses in our immigration management system and mapped out suggested fixes. The problem is not a lack of such reports; it is instead their hyperabundance.

Each suggested fix, no matter how straightforward it appears in the clinical prose of the auditors, in fact requires enormous energy and focus to implement. For one thing, the suggested reform is always contestable; sometimes outside reviewers overlook certain key operational elements well known to those who carry out immigration tasks in the field day in and day out. Different schools of thought have to be heard out; a decision made by responsible managers, often (until now) the Commissioner or the Attorney General, who obviously have numerous competing demands on their time; and then new regulations, forms and practices have to be put in place, often including thousands of hours of retraining. Regulations alone can easily get stalled for months or years in the clearance process unless a high-level official personally keeps the heat on. No commissioner, director, or undersecretary can be successful at this kind of reform if spread too thin. Choices have to be made about which reforms to press first, so that they can be seen through to actual realization on the ground. Other reforms will simply have to wait.

This reality of immigration reform is often lost from view in oversight hearings that criticize immigration officials for failing to implement some GAO or IG recommendation. There

are simply too many of them, measured against the reality of what it takes to turn such proposed reforms into reality. Sometimes during my tenure at INS, while scheduling yet one more interview with the IG's extensive staff examining some immigration misfire, my thoughts wandered to how nice it would be if INS could simply incorporate the investigative or audit team to augment the meager ranks of those actually trying to implement needed changes. My point is that we must take care lest audits, investigations, and reports claim a disproportionate share of the time and resources that could instead be used in implementation. We also need to be realistic about the need to prioritize those smaller scale, but vital, fixes to our immigration machinery.

In this connection, I would advise against creating an ombudsman in the new department, although I well understand the frustrations that have led to the popularity of such a proposal in nearly all the current immigration reform bills. Instead of adding one more wild card in the chain of authority and command, it would be wiser to concentrate on building better customer service, with enhanced quality control, directly into the functioning of the new immigration services bureau. If an ombudsman is still thought necessary for individual cases, I would urge keeping the office as lean as possible, thus freeing up resources for improvements in direct services. Above all, the legislation should greatly limit the responsibility and authority of the ombudsman to make broad public reports and detailed suggestions for management reforms. These functions are already adequately served by the GAO and the IG's office.[5]

2. Clarity of mission is more important than reorganization to the eventual success of immigration policy. Congress should actively work to simplify the immigration laws. Closely related to the previous point is the overwhelming complexity of our modern immigration laws. INS has had little time to work on patient micro-level improvements over the last six years, because it has been so overwhelmed by the need to implement, often on a compressed deadline, a variety of complex new statutory initiatives. If we want successful immigration management, we have to provide a stable structure of laws, and we should seek to simplify them wherever possible. Instead, we are going in the opposite direction. Much of the problem derived from the 1996 reform legislation, particularly the Illegal Immigration Reform and Immigrant Responsibility Act, which was both massive and unnecessarily complex.

Even where Congress has recognized that some of those provisions were ill-designed or overly harsh, it has not taken the better step of repealing the problematic provision. Instead it seems bent on adopting complex new carve-outs that help only a fraction of those in question. This happened, for example, with the enactment in 1996 of tight new restrictions on what we used to call suspension of deportation (it is now cancellation of removal under INA § 240A(b)). Congress seemed to regret that step in 1997, but instead of restoring the old rules, it adopted a special set of exemptions (a kind of amnesty) applicable only to Nicaraguans and Cubans, plus

[5]I assume that the new Homeland Security Department will have an inspector general comparable to the office now in the Justice Department.

yet a different set of rules, less generous, for certain Guatemalans and Salvadorans. (The Nicaraguan Adjustment and Central American Relief Act.) Creating the new regulations and forms consumed an inordinate amount of INS time and effort that could have been better spent elsewhere. The problem was compounded the next year, when Haitians were (in my view properly) brought into the fold of exemption -- but with yet another set of special rules not quite like those that apply to the earlier groups. (The Haitian Refugee Immigration Fairness Act of 1998.)

The debate over section 245(i) of the Immigration and Nationality Act (INA) unfortunately follows the same pattern. In all the debate over this provision, one can hardly tell that the meat of the problem derived from a superficially attractive, but ultimately quite flawed, enforcement measure adopted in 1996. That measure consists of the three- and ten-year bars of INA § 212(a)(9)(B), meant to punish people for earlier illegal presence in the United States. At various points Congress has obviously grown uncomfortable with full enforcement of the bars, but instead of repealing them, it has adopted a highly complex set of grandfathering provisions, through periodic revivals of 245(i), meant to free some persons from the bars (but only doing so imperfectly).[6] We could hardly have designed a response to the underlying problem more certain to complicate INS's implementation task. Repeal of the bars would be a far better course, particularly because of its beneficial impact in freeing up INS resources for more productive use.

Legal complexity is not necessarily bad. Sometimes it is needed to address genuinely complex problems. But far too much of the INA consists of complications that cannot claim such a justification -- complexity that solved a transitory political problem but only at the unobserved cost of disabling sound immigration functioning and diverting reform energies.

The Immigration and Nationality Act turns 50 years old tomorrow. To my knowledge, no one is celebrating the anniversary, in part because it has become such an unwieldy and hard-to-manage set of rules and procedures. For the future, Congress should adopt no new immigration measures without considering carefully their full *implementation impact*. Whenever a problem could be solved by a simple repeal, that course should be chosen over any new mechanism that adds special benefits for a targeted group. We have driven ourselves into many of our current immigration problems because we have ignored the realities of implementation when new legislation is proposed and debated. We should at least stop compounding the difficulties. Maybe at some point, once reorganization is well under way, we could embark on a deliberate course of immigration law simplification.

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[6]I will not rehearse the full technical and policy argument for repeal of the three- and ten-year bars here, but it appears in Martin, *Waiting for Solutions*, Legal Times, May 28, 2001, at 66.

TESTIMONY OF BILL McCOLLUM
Former Member of Congress (R-FL)
on
"IMMIGRATION COURT IN HOMELAND REORGANIZATION"
before the
U.S. Senate Committee on the Judiciary
Subcommittee on Immigration
Washington, D.C.

June 26, 2002

Mr. Chairman:

Unfortunately I could not be present in person to testify, but I appreciate the opportunity to submit this written statement expressing my views on the future structure and status of the Executive Office for Immigration Review (EOIR), the Immigration Court and Immigration Judges, especially in light of the recent Administration proposal to create a new Department of Homeland Security and transfer the Immigration and Naturalization Service (INS) to its jurisdiction.

I strongly recommend that in this reorganization Congress do one of the following: (1) create an Article III Immigration Court; (2) establish an independent immigration adjudicatory agency to house EOIR, the Immigration Court and Immigration Judges in the Executive Office of the President; or (3) fully separate INS from the same reporting Cabinet officer by explicitly directing that EOIR, the Immigration Court and Immigration Judges remain in the Department of Justice rather than being transferred with INS to the new Department of Homeland Security.

For 18 of the 20 years I had the privilege of serving in the United States House of Representatives I was a member of the House Subcommittee on Immigration. Through many hearings and other opportunities to conduct oversight I formed definite views regarding the need for Immigration Judges and the Immigration Court to be independent of INS and the Department of Justice where both have resided for their entire existence.

In at least the last six Congresses before I left in January 2001, I introduced legislation to establish an Article III Immigration Court. This had been the recommendation of the

Commission on Immigration which reported to Congress in 1980 and whose recommendations formed the basis of the Simpson-Mazzoli legislation in 1986 which created employer sanctions. The creation of the Article III Court is the only major recommendation of that Commission never to have been enacted. In 1997 another commission, the United States Commission on Immigration Reform, reported to Congress a recommendation to place the Immigration Court and the Board of Immigration Appeals and the basic functions of Immigration Judges and the EOIR in an independent agency. There was actually a split vote of the Commission with a bare majority favoring the independent agency status over an Article III Court. But the basic rationale for both Commissions' proposals were the same in 1980 and in 1997 and are equally applicable today.

While we call them Immigration Judges, those performing adjudicatory tasks in immigration matters are attorney employees of the Department of Justice just as the attorneys of the INS are. They are judges in name only. Yet they are called upon to make adjudicatory determinations that will grant or deny individuals the right to remain or not in the United States and to ultimately become a citizen or not. In the way that they affect the lives of people and project to the rest of the world the long established image of America as a land of immigrants open to limited migration through a fundamentally fair process, they are in an entirely different league from Administrative Law Judges or any other adjudicators in the Executive Branch. There are many Article III and Article I judges who make far fewer decisions basic to individual rights and our system of government than those who bear the title Immigration Judge.

The hallmark of our freedoms is the system of checks and balances that our Founding Fathers gave us by creating the three branches of government: legislative, executive and judicial. By making Article I and Article III judges independent of the executive or legislative branches of government our Constitution provided judges with the ability to act with independent judgment free of undue influence from legislators or executives. It is the lack of such an independent judiciary in so much of the rest of the world that impedes the development and growth of democracies, and it is our judiciary that distinguishes our free nation more than any other thing from all other countries of the

world. But in the area of immigration we have failed to carry forth this basic hallmark of our system.

The inherent deficiencies in the immigration adjudicatory system were recognized even before commissions recommended the establishment of a court or an independent agency. In 1956, Special Inquiry Officers (SIO's) were separated from the supervision of the INS District Directors because these INS District Directors were often found to make a shambles of any pretense of independent adjudications by these officers. In 1973 these immigration adjudicatory officers were authorized to use the title Immigration Judge and to wear robes in their courtrooms – a further effort to provide at least the appearance of independence and fairness. Then in 1983 the Attorney General separated the Immigration Court and the Board of Immigration Appeals from the INS and created the EOIR. This was done in a further effort to distance the adjudicatory officers from the INS officers who often have a "prosecutorial" role in immigration proceedings. But all of this never came to grips with the basic problem of having the INS "prosecutors" reporting to the same boss, the Attorney General, as Immigration Judges and those doing the review of immigration cases. Not only did there remain the appearance of impropriety in this regard and a technical lack of judicial independence, but also a number of very practical problems in running a courtroom and processing immigration cases.

In an effort to give Immigration Judges some additional color of independence and the ability to control their courtrooms and advance the court calendar, Congress in 1996 legislated contempt and subpoena powers for Immigration Judges delegating the Attorney General the authority to by regulation implement them. But in the six years intervening since this legislation became law no such regulations have been promulgated. I have reviewed some of the internal documents of the Clinton Administration Justice Department and discussed this matter with a number of individuals including some in the current Administration's Justice Department. It is apparent to me that despite the wishes of Congress, INS officials have been able to persuade upper management in the Justice Departments of two Administrations that giving contempt powers to Immigration Judges who are equivalent employees in the Justice Department to attorneys working for the INS is somehow wrong. Every

imaginable roadblock has been thrown up to granting these powers. Consequently, Immigration Judges have no real means of enforcing decorum in their courtrooms or sanctioning attorneys for the government or individuals who fail to heed court orders or timetables critical to rights of the individual parties and caseload management from a public interest perspective.

The simple truth is that the adjudicatory officers in immigration matters need to be real judges in a real court with real judicial powers. If there were any way possible I would urge you to take the opportunity afforded by the dramatic restructuring in creating the new Department of Homeland Security to establish an Article III Immigration Court. Failing that, I would urge you to create an agency within the Executive Office of the President to house EOIR, the Immigration Court, and Immigration Judges. And certainly, if that is not possible, at the very least, I would urge you to take this opportunity to fully separate the INS from the same reporting Cabinet officer as the Immigration Judges by explicitly directing that EOIR, the Immigration Court and the Immigration Judges remain in the Department of Justice rather than being transferred with INS to the new Department of Homeland Security. While there can be differences of opinion and arguments made for any one of these three alternatives, there is no sound argument that can be made for continuing the status quo of having the same department head responsible for both the INS and the immigration adjudicatory agencies and functions.

Some might suggest that taking any of these routes would diminish efficiency in the immigration process, but the failure to do so and the continuation of the status quo by the transferring of both INS and EOIR and the courts to the new Homeland Security Department would continue and possibly exacerbate inefficiency in immigration proceedings. Immigration Judges with some vestiges of judicial power and independence at least on the level of contempt authority with the teeth of civil sanctions could move cases much more rapidly through the system. And so much of the backbiting that apparently goes on now between INS and those involved in the adjudicatory functions would largely evaporate. There would additionally be projected a greater sense of fairness in the system. This is intangible, but nonetheless significant.

Some critics may argue that a move to more independence for adjudicators would take away some of the President's prerogatives in carrying out the nation's immigration laws which are inherently an executive function. Actually, the legislative branch ultimately controls immigration. Except for due process rights, non-citizens have only those rights and privileges granted by Congress. In the past Congress has delegated the principal authority to the executive branch, not the judicial. For national security reasons it is understandable why some would argue that a degree of authority in these matters needs to remain with the nation's Chief Executive Officer. Even with the establishment of an Article III Court Congress could keep the ultimate authority where needed in the hands of the President. Certainly there is no threat to the President's authority in either of the other two options of independent agency status within the Executive Office of the President or in placing INS in the Homeland Security Department and the Immigration Court and EOIR in the Justice Department. Consequently, concerns in this regard should easily be allayed while resolving the inherent flaws of the present structure.

Congress has a great opportunity in the debate over the creation of the Department of Homeland Security to rectify longstanding ills within the adjudicatory functions of immigration law. I strongly encourage you to take full advantage of this opportunity, and if you do, future generations will thank you.

Statement of

Kathleen Campbell Walker
American Immigration Lawyers Association

Before the
Subcommittee on Immigration
Judiciary Committee
United States Senate

Regarding

Immigration Reform and the Reorganization of Homeland Defense

June 26, 2002
Washington, D.C.

Mr. Chairman and Distinguished Members of the Subcommittee:

My name is Kathleen Campbell Walker. I am honored to be testifying today before you on behalf of the American Immigration Lawyers Association (AILA). AILA is the national bar association of nearly 8,000 attorneys and law professors, who represent the entire spectrum of individuals subject to our immigration laws. I am a member of AILA's Executive Committee, was privileged to chair AILA's State Department Liaison Committee for the last three years and also am a member of that organization's Border Issues Committee. I also practice immigration law in El Paso, Texas, where I have focused on border issues for over 16 years. In addition, I serve on the Texas State Comptroller's Border Advisory Council, and have served as a board member of the Border Trade Alliance as well as a member of the Executive Committee of the Texas Border Infrastructure Coalition. I worked for four years as President of the El Paso Foreign Trade Association to establish the first Dedicated Commuter Lane using Secure Electronic Network for Travelers' Rapid Inspection (SENTRI) technology in the state of Texas. I thus bring to the table practical experience regarding the challenges of border security and cross-border and cross-agency issues that I hope will be of use to the Committee.

INTRODUCTION

Before presenting specific immigration proposals in the context of the proposed Department of Homeland Security, the following points need to be emphasized.

- **Congress has the important responsibility of reviewing and modifying, as necessary, the President's Homeland Security Department initiative that would implement the most far-reaching changes to the organization of our government since the Second World War.** In fact, every American who seeks to make our nation safer also shares this responsibility. Questions about how best to address our security concerns must not be labeled as "special interest" griping or defending the status quo because too much is at stake to stifle or discourage debate, and all of us want the best system developed and implemented. In fact, the process by which we debate and create a Homeland Security Department will be as indicative of the state of our democracy as the final Homeland Security Department that becomes law. AILA thus welcomes the opportunity to testify on this important issue.

- **AILA cautions the Committee, and Congress as a whole, to proceed deliberately and carefully**. While many have urged that the formation of this new Department become law before the end of this Congressional session, we believe that getting it right is more important than proceeding quickly. And if getting it right takes more time, then Congress and the Administration should take the time needed to get it right. We cannot afford the mistakes and oversights to which a hasty examination and debate could easily lead.

- **We as a nation need to enhance our security without harming our internationally based economy, our dedication to respecting individual rights preserved by the Constitution, and our tradition as a nation of immigrants. AILA strongly supported the passage of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) (Border Security Act) because that measure achieves an appropriate balance between these concerns.** The Border Security Act is premised on two facts. First, enhancing our intelligence capacity is key to our increased security. The face of terrorism is not tied to one nationality, religion, or ethnic group. The horrific terrorist action in Oklahoma is an ever-present reminder to us of that painful fact. Any changes in federal policies and procedures must allow our federal agencies timely access to valuable and reliable intelligence. In fact, the most important mission of the proposed Homeland Security Department is to further enhance our intelligence capacity and ensure interagency sharing of information. Our government has come a long way since September 11, with federal agencies now sharing data more frequently than in the past. However, more needs to be done, and failure to do a better job of intelligence gathering and coordinating the sharing of information will mean that we have failed to enhance our security.

  Second, the Border Security Act recognizes that our most effective security strategy is to keep out those who mean to do us harm, while admitting those who come to build America and make our country stronger. Immigration is not a synonym for terrorism. The problem here is terrorists, not immigrants. We need to isolate terrorism, not America.

  The Border Security Act's provisions reflect two important understandings about our country and our needs—namely, that we are a nation of immigrants, and that we must undertake any reforms in ways that do not destroy our economy and commerce. The U.S. is an integral part of the world economy, with global business, tourism, and migration serving a pivotal role in our economic prosperity. As we take important and needed steps to enhance our security, we must seek to ensure the efficient flow of people and goods across our borders. If we do not, we risk both chaos at our borders and the destruction of our economy, and along with it, the ability to pay for our national security. "Fortress America" is an undesirable and impractical solution that repudiates our history and our economic and social needs as well as the current reality of our global economy.

  Nearly 500 million entries occur annually by people who come to the U.S. as tourists, business people, students, or to visit with their families. Less than one million annually settle here as immigrants. Living in a border community as I do underscores on a daily basis the imperatives this flow creates, and the necessity of balancing our security needs with the fact that we are a nation of immigrants and that we must continue to facilitate the free flow of people and goods. In fact, our best protection is to focus our security resources where they are most needed. We must be able to identify and separate low risk travelers and

facilitate their entry. Such measures are more effective and more easily implemented than measures that focus on persons after they enter the U.S. We need to make sure that we use our resources in the most effective way possible to keep out those who seek to do us harm, not those seeking to come to our country for the reasons that people have always come here, including escaping persecution, desiring to be reunited with their families, working legally in the U.S., investing or conducting business in the U.S., or visiting this country as tourists.

- **The bureaucratic restructuring created through the Homeland Security Department cannot take the place of either a comprehensive homeland security strategy or the need to reform outmoded immigration laws.** While the Bush Administration's proposal seeks to reorganize government, it is silent on the policies necessary to enhance our security, and the costs of such policies. Nowhere are such policies more needed than at our nation's ports of entry. And nowhere is there a greater call for change than in reforming our immigration laws to enhance our security, support our economy and American businesses, and reunite families. I will discuss both issues in more detail later in this testimony.

- **In the current environment, it is especially important to reaffirm that this nation's strength and future reside in our unity as a nation, our diversity, and the democratic principles upon which our country is based**. It is also important to remember that U.S. immigration policy is based on a number of values that relate to the core social and economic principles upon which our nation was founded. These values are complementary and interweave to create the rich fabric that is beneficial to all Americans. Among the most important values are: the unification of American families; employment-related immigration to keep America strong in a global economy; asylum protection for refugees fleeing persecution; naturalization based on allegiance to the principles contained in our Constitution and laws; immigration courts that are independent, impartial, and include meaningful checks and balances; and immigration policy that is implemented through a well-regulated system based on law, with fair, uniform, and predictable requirements.

  As the current situation calls out for change in the direction of more effective means of deterring terrorism, we must not lose sight of these fundamental values of this nation of immigrants. As we seek to create new means to isolate terrorists, we must take care not to isolate America in the process.

THE BUSH ADMINISTRATION'S PROPOSED HOMELAND SECURITY DEPARTMENT

The Bush Administration has proposed a major restructuring of the federal government that would realign government activities into a single cabinet-level homeland security department whose primary mission is to detect and deter terrorism. The new Department

of Homeland Security would be divided into four divisions: Border and Transportation Security; Emergency Preparedness and Response; Chemical, Biological, Radiological and Nuclear Countermeasures; and Information Analysis and Infrastructure Protection. (The FBI and CIA would remain as independent agencies.) While proposing this massive structural reform, the Administration is silent about the comprehensive homeland security strategy that needs to accompany this bureaucratic restructuring.

AILA will focus its comments on the immigration aspects of this proposal. The Border and Transportation Security division, as proposed, would subsume our nation's immigration function. Along with all of the INS (enforcement and immigration services), and the Executive Office for Immigration Review (EOIR), currently part of the Justice Department, this division would include visa processing (from the Department of State), the Customs Service (from the Treasury Department), the Coast Guard and the Transportation Security Administration (from the Transportation Department), Animal and Plant Health Inspection Service (from the Agriculture Department), and the Federal Protective Service (from the General Services Administration). While under the Administration's proposal, the Coast Guard and the Secret Service would retain their independent identities and agency titles, the proposal indicates that the other "units," including the INS, would be "integrated into the new organization, ensuring that there is one clear organization built on divisions with clear mission statements and lines of authority."

The Administration has indicated that this proposal is consistent with the President's "long-standing proposal to reorganize our immigration system to focus on enforcement and administrative functions separately. Under this proposal, the enforcement and administrative functions would be separated within the new Department to ensure that those on the enforcement side are free to focus on enforcement, while those on the services side are free to reform and improve the way we treat those who are seeking to immigrate legally to this country." However, it is questionable whether an agency whose overall goal is counter-terrorism and security will be able to properly fulfill the responsibility of providing timely and efficient immigration services that respect our laws.

The current structure and functioning of the INS only reinforces this concern. As a consequence of how INS is currently organized, an enforcement mentality is often reflected in inappropriate ways in adjudication decisions. The negative consequences of an unbalanced enforcement emphasis at our ports of entry were clearly evident even prior to September 11. For example, in recent years, adjudications by inspectors at ports of entry under the North American Free Trade Agreement (NAFTA) have become more inconsistent and less commerce-oriented due to a perceived need to make entries to the U.S. in Trade NAFTA status more restrictive. The result has been not the prevention from entry of terrorists, but the prevention from entry of legitimate business people attempting to carry out economy-fueling trade.

Even more troubling is the fact that the inspectors performing these adjudications at the ports of entry also have nearly carte blanche authority to deny someone entrance into the

U.S. and to order "expedited removal." In an expedited removal situation, there is no right of legal representation, and the inspector's decision, usually made on the spot, is not subject to appeal or scrutiny. However, as a result of this quick decision, the individual is barred from reentry for five years. Often individuals do not even understand what has happened to them if expedited removal authority is invoked. If the enforcement element of inspections is further accentuated and enhanced, the possibility of fair and efficient adjudications becomes even less likely. Such power housed within a security agency can only lead to further erosion in fair and informed decision-making.

Furthermore, immigrants and their U.S. citizen and legal permanent resident family members are deeply troubled by the notion that the admission to the U.S. of their loved ones would be viewed primarily through the lens of security and enforcement, thereby equating immigration with terrorism.

Finally, this proposal subsumes many non-security functions that many fear will not get the attention they merit in a department so focused on security.

Under the Administration's plan, visa processing would be brought within the Border and Transportation Security division so that the "new Department would consolidate the legal authority to issue visas to foreign nationals and admit them into the country. The State Department, working through U.S. Embassies and consulates abroad, would continue to administer the visa application and issuance process." Thus, while the State Department would continue to issue and process visas, this proposal "will unify the policy authority on who can receive visas in the new Department." This proposal raises concerns about how such a division would operate and impact the process of granting visas.

In addition, this proposal will likely lead to Congress reorganizing itself to "match" the agency line-up created by the new department. However our immigration function is restructured, it is vitally important that the Committee with expertise on immigration, the Judiciary Committee of the House and Senate, retain jurisdiction over our immigration function.

While the Administration reportedly did not consult Congress in developing this proposal, much of it appears to mirror provisions in S. 2452/H.R. 4660 introduced in the Senate and House by Senator Lieberman and Representative Thornberry, respectively. AILA had opposed the Lieberman bill because its approach to immigration is deeply flawed. The proposed changes to the INS in that measure run counter to the effective reorganization contained in the bipartisan Senate INS reorganization bill (S. 2444), introduced by Senators Edward Kennedy (D-MA) and Sam Brownback (R-KS).

HOW OUR IMMIGRATION FUNCTION CAN BEST CONTRIBUTE TO OUR NATIONAL SECURITY

Our immigration function can best contribute to our national security needs in two ways: first, by being effectively, efficiently and fairly reorganized, and reorganized outside of the Department of Homeland Security. Secondly, Congress and the Administration need

to support changes in our laws that would make legality the norm. This latter issue will be discussed at the end of this testimony.

Reorganizing our Immigration Function: AILA believes that reorganizing our immigration function and maintaining this function outside of the proposed Department of Homeland Security would achieve two results: a more effective, efficient and fair immigration process and enhanced national security. AILA greatly appreciates the hard work of members of the House Judiciary Committee, and in particular the subcommittee, who have focused on the need to restructure the INS. While their efforts have contributed much to the debate on how best to reform the INS, AILA believes that S. 2444, introduced by Senators Kennedy and Brownback, provides the best roadmap for reform.

AILA supports maintaining our immigration function outside of the proposed Homeland Security Department for the following reasons:

- **Our nation's immigration function needs to receive higher priority and more authority and resources, not less.** Given the importance of immigration, AILA believes that our immigration function, as is the case with the FBI, needs to remain separate from this newly proposed, large federal bureaucracy. In fact, to achieve maximum efficiency and effectiveness, our immigration function must be given higher prominence within our government. The best way to achieve this end is to effectively reorganize the INS (as structured in S. 2444) and implement mandated cooperation between the reorganized INS and the new Homeland Security Department.

- **Moving our immigration function into a Homeland Security Agency repudiates our tradition as a nation of immigrants and reflects a fundamental (and inaccurate) shift in how our nation views and treats immigrants.** Placing our immigration function within a department whose mission is to "prevent terrorist attacks within the United States; reduce the vulnerability of the United States to terrorism; and minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States" repudiates our tradition as a nation of immigrants and the history that has made us strong. In fact, placing our immigration function within a Homeland Security Department sends the signal that immigrants are to be feared and not welcomed as economic, cultural, social and political assets.

- **Immigration services and processing would fare poorly in the proposed new department**. Under the Bush Administration's proposal, immigration services would compete for funding with entities including the Coast Guard, Customs, the Border Patrol, and Transportation Security. The services budget and policies would not fare well, resulting in a service function in worse shape than it is now and increasing backlogs. In addition, given the new department's mission, enforcement and adjudications concerns would not be balanced, leading to a reduction in the admissions into the U.S. of legal immigrants and non-immigrants (close family members of U.S. citizens and legal permanent

residents, and needed workers for U.S. businesses) and refugees and asylum-seekers, with negative consequences to our economy and society.

- **Placing our immigration function within the new department leads to concerns about civil rights**. The new department's mission suggests that the important balance between security and due process protections and guarantees would not be maintained. It is too easy for civil liberty considerations to be downplayed within a Homeland Security Department concerned with enforcement and national security.

Given these concerns, AILA strongly supports reorganizing the Immigration and Naturalization Service (INS) and keeping the INS independent of, but coordinated with, the proposed Homeland Security Department. AILA also strongly supports the reorganization plan developed in the bipartisan S. 2444, the Immigration Reform, Accountability, and Security Enhancement Act of 2002.

No matter where the immigration function is placed—within or outside of the proposed Department of Homeland Security—S. 2444 should provide the road map for any reforms undertaken.

IMMIGRATION IN A HOMELAND SECURITY DEPARTMENT

AILA strongly supports reorganizing our immigration functions (as restructured in S. 2444) and maintaining these functions as an entity outside of the proposed Homeland Security Department. Such a reorganization and placement best meets our security, family reunification, and business needs and best fulfills our international obligations with regard to refugees and asylees.

If Congress and the Administration opt to include our nation's immigration functions within the proposed new homeland security department, we urge that S. 2444 be used to guide how immigration is organized within the new department. In that regard, we propose that three subdivisions should be formed headed by a strong leader with the title of Undersecretary. AILA also strongly believes that the care and custody of unaccompanied alien children should be transferred to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services.

Establish an Undersecretary for Immigration Services and Security: The primary responsibilities of the Undersecretary for Immigration Services and Security would be to secure our borders, prevent the entry of terrorists, and administer the Customs laws of the United States; administer the immigration and naturalization laws of the United States, including establishing the rules governing the granting of visas and other forms of permission to enter the U.S. to individuals who are not citizens or lawful permanent residents; enforce our immigration laws within the interior of the United States; ensure oversight of our immigration laws and the protection of civil and due process rights in carrying out these responsibilities; and ensure the speedy, orderly, and efficient flow of lawful traffic and commerce in carrying out these responsibilities. Given these

responsibilities, this Undersecretary must have experience in both enforcing U.S. immigration law and adjudicating immigration benefits.

A Strong Leader is Needed: It will be very important to follow the model outlined in S. 2444 and appoint an Undersecretary, a high-level person with clout to be in charge of these functions. A successful reorganization of our immigration functions hinges on the appointment of a high-level person with line authority. Such an official would improve accountability by fully integrating policy making with policy implementation, ensuring direct access to high-level officials within the executive branch, attracting top management talent, having authority both horizontally and vertically, and leading the efforts of the subdivisions. It is vitally important that one person at the top articulate a clear, coherent, and unified immigration policy within the government, to Congress, and to the world.

Given this country's urgent need to maintain and upgrade its security, it is now more pressing than ever to place one person in charge who is accountable so that our laws are implemented quickly and fairly, rather than developing rival bureaucracies that will balkanize immigration policy. Even before the proposal for a Homeland Security Department was made, a consensus had been reached that separating the enforcement and adjudications functions will lead to more clarity of mission and greater accountability, which, in turn will lead to more efficient adjudications and more accountable, consistent, and professional enforcement. However, coordination of these functions is as important as separation, and is key to a successful reorganization because enforcement and adjudications are two sides of the same coin. Almost every immigration-related action involves both enforcement and adjudicatory components. Only through such coordination will we achieve consistent interpretation and implementation of the law, clarity of mission and, in turn, more efficient adjudications and more effective, accountable, consistent, and professional enforcement. Such coordination cannot be achieved merely by creating a shared database. Inconsistent policies and interpretations of the law, the lack of a common culture and, most importantly, the absence of someone in charge who can resolve differences, can turn routine questions into Kafkaesque nightmares.

S. 2444 is the Appropriate Model for Structuring an Immigration and Border Security Division. S. 2444 provides for the necessary person in charge and coordination, which is why AILA urges that it be used as the model for organization of immigration functions within a Homeland Security Department. The other congressional proposal, H.R. 3231, does not create a strong person in charge and does not provide for adequate coordination. While H.R. 3231 separates enforcement and adjudications by creating two separate Bureaus, there is little coordination between the two, save a General Counsel placed in a weak suboffice. This coordination is largely lacking because there is no high level official given sufficient authority over the two bureaus who would be able to integrate shared information systems, policies, and administrative infrastructure, including personnel and training. The divisions would likely end up working at cross-purposes, with the leaders from each sending conflicting messages on policy matters pertaining to complex laws.

Such an absence of coordination could lead to inconsistent opinions and policies, and result in each bureau implementing laws differently, thereby creating ongoing difficulties. The absence of coordination would exacerbate these concerns even more and raise additional questions. For example, since border inspections combine both adjudications and enforcement functions, how would the many different activities that take place at our ports of entry be handled? These activities can include officials adjudicating asylum eligibility, granting final admission as a legal permanent resident based on an immigrant visa, issuing entry documentation, interdicting those ineligible to enter the United States, and assisting in the interdiction of those engaged in trafficking activities.

Given the structure of H.R. 3231, these functions would not be organized, integrated or coordinated. Furthermore, how will Congressional staff be able to efficiently handle requests for assistance on immigration matters? Without adequate coordination, staff would be forced to deal with two separate bureaus that implement different policies and practices, making their jobs much more difficult and time-consuming.

To Accomplish these Goals, AILA Supports the Creation of Three Subdivisions Within the Proposed Immigration and Border Security Division. These subdivisions would be:

1. **Border Security Subdivision:** This subdivision would include the United States Customs Service (now in the Department of Treasury), border functions of the Coast Guard (now in the Department of Transportation), the Animal and Plant Health Inspection Services (now in the Agriculture Department), primary Inspections, and the Border Patrol (both currently in the INS/Justice Department). Of particular concern are the two functions now housed at the INS, inspections and the Border Patrol.

   Inspections: Inspections is of particular concern because it is the immigration function in which adjudications and enforcement most closely intersect. As such, it has never been viewed as an enforcement function, but rather, one that brings together enforcement and adjudications because inspectors determine (i.e., adjudicate) who is eligible to enter the U.S. The INS currently inspects all persons seeking admission or permission to transit through the United States at air, land and sea ports of entry. Inspectors determine if applicants qualify for admission and, if so, under what status. Applicants include people seeking safe haven, tourists on vacation, needed workers coming to join their U.S. employers, and family members reuniting with their U.S. citizen or legal permanent resident relatives. While inspections must function to keep out the people who mean to do us harm, inspectors must also allow entry into this country of people who help build up America and are central to who we are and to our country's continued economic vitality.

   The INS inspects more than half a billion entries each year. (This number includes all categories of temporary visitors, green card holders, and U.S. citizens, and multiple crossings by the same individual.) The percentage of those

who are found to be inadmissible is just over 1/10 of one percent. (Source: INS Monthly Statistical Report, July 2001.) More than 80 percent of all inspections are done at land borders (more than 400 million). Air inspections are second with just under 80 million annually. (Source: INS Inspections Statistics). 80 percent of land border inspections are same-day trips. (Source: North American Trade and Travel Trends). Approximately 800,000 border crossings are made daily between the U.S. and Mexico; approximately 260,000 cross each day between the U.S. and Canada. (Source: North American Trade and Travel Trends.)

In 2000, international travelers spent $82 billion in the U.S., not including passenger fares. This activity supports one million U.S. jobs in the tourism industry.

To categorize the inspections function as being strictly enforcement-related painfully ignores one of the most pivotal functions of inspections—adjudications. Thus, it is important to separate out primary inspections that would be part of the new border security division, from secondary inspections, which should become part of the immigration services division (see below).

Border Patrol: The Border Patrol, as the mobile uniformed branch of the INS, has as its mission the detection and prevention of smuggling and illegal entry of aliens into the United States, with primary responsibility between the ports of entry. Border Patrol agents perform their duties along, and in the vicinity of, the 8,000 miles of U.S. boundaries. It is important that the Border Patrol implement the law consistently and fairly. The Border Patrol has significant authority to detain or release someone and has been subject in the past to allegations of civil rights violations

How to deal with our Ports of Entry—Unified Port Management: Border communities for years have dealt with the apparent inability of the agencies staffing our ports of entry to coordinate staffing, infrastructure needs, policies, and procedures. This lack of coordination has had a negative impact on border economies due to reduced efficiencies in the cross-border flow of people and goods. The September 11 attacks heighten concerns over how such a lack of coordination would weaken our national security. Unfortunately, the Border Coordination Initiative (BCI) launched in 1998 that focused on interagency enforcement coordination insufficiently addresses our national security concerns. In many areas, the Port Quality Improvement Committee meetings that the BCI mandated have not changed the status quo with regard to coordination and accountability. The September 11 attacks have underscored the need to change the status quo in order to achieve border security.

While the proposed Department of Homeland Security does not focus on how our ports of entry would be managed, the proposal assumes that entities under one command would coordinate and cooperate, and that policies and procedures, as well as staffing and infrastructure needs, would be approved and coordinated

by a central management body. However, such an initiative will fail if it does not uphold the important balance between enforcement and adjudications in the context of INS inspections (and thus the division maintained here between primary and secondary inspections). Furthermore, Congress and the Administration must adequately fund and staff our ports of entry, and each port must be held accountable for its performance. No advancement in grade should occur unless performance merits such advancement in conjunction with continuing training achievement. Regular training must be timely provided and required. Adequate support staff must also be provided, and precious supervisory and adjudicative time must no longer be wasted on clerical functions, including fee intake. As a very simplistic example, it makes sense to test the use of ATM-like machines to intake fees and issue more secure I-94s (Arrival/Departure Record).

Furthermore, The Border Patrol and the Coast Guard must coordinate their staffing, infrastructure, enforcement and security policies and procedures. These policies and procedures must be consistent with those implemented at our ports of entry in order to create a more secure border environment that reflects consistent application of our laws

2. **Immigration Services Subdivision**: AILA is most concerned with placing immigration services within the new department. If immigration services are included in the Homeland Security Department, it is vitally important that the important work that the INS has done by, for example, granting citizenship and legal residency to hundreds of thousands of hard working people and relatives of U.S. citizens and legal permanent residents not be lost. In fact, immigration is and needs to be about more than internal security: It also is about recognizing that immigration and immigrants strengthen our country, and without immigration our country will be less vibrant and strong.

   Various GAO studies have illustrated that the current provision of services provided by the INS to its "customers" is woefully behind the times. A new "corporate culture" needs to be instilled in the Immigration Services Division that trains personnel to provide U.S. petitioner family members and businesses, along with foreign-born beneficiaries, with the service that they deserve under our laws. The improvement of services, and the achievement of timely adjudications, will reduce the current backlogs and will provide much-needed relief to those who have been waiting in line for years to unite with family members or provide needed skills to U.S. businesses. The assurance that the paths to legal immigration provided under our nation's laws can be achieved without lengthy delays will further reduce the incentive to circumvent the law, reducing illegal immigration to our country.

   With these important concerns in mind, this subdivision would include services and adjudications and secondary inspections, which are now in the INS/Justice Department. Service and adjudication functions would include: adjustment of status, naturalization, adjudication of immigrant and nonimmigrant visa

applications, issuance of work permits, and asylum and other humanitarian cases, and "well-founded fear" screening of political asylum applicants.

Secondary inspections at ports of entry should also be part of Immigration Services. Primary inspection is where an applicant for entry into the United States is initially reviewed to see if there is any enforcement or eligibility reason to refuse entry. It is not uncommon for questions to arise as to whether the individual meets the criteria for entry. For example, it may not be clear whether an individual seeking entry for business is coming for a bona fide business trip, allowing him to enter on a business visitor's visa or under the visa waiver program, or whether the purpose of the trip might cross the line into employment in the United States, requiring a visa that includes appropriate work authorization. This is an adjudicative function, requiring an examination of the totality of the circumstances that cannot be made in the context of the pressures of primary inspection and requiring a decision-maker who is fully trained in adjudicative standards. Thus, it will be critical for Immigration Services to have a role in Inspections, and secondary inspection is where this role is usually played.

A department with the mission to guard against terrorism must also ensure that families are reunited, international commerce is enhanced, and tourism is encouraged. This is a security matter: America's understanding of the world in which we exist is greatly enhanced by the presence of immigrants and visitors from other countries. This is an economic matter: immigration and tourism has provided much fuel for our economy, and studies show that both will increase in future years. This is a matter of our national values: protection of the oppressed and unity of families underpin what makes the United States great.

It will be important that these initiatives have a strong voice within the division and within the Department. Because the Services operation will have the most knowledge of adjudications issues, it must also have a significant role in policy development and implementation. It is also critical that Immigration Services have the resources necessary to do its job, including staffing, technology and infrastructure requirements. Neither our nation's security nor our nation's values are served by adjudications that are delayed for years, petitions that are lost in huge warehouses, simple processes that are made complex by duplication and inefficiency, and delays that require the readjudication and re-checking, over and over, of the same data simply due to the passage of time.

Ajudication fees paid by applicants for immigration benefits should be used solely to adjudicate those applications. None of these funds should be diverted to support other functions. Applicants and petitioners, particularly when they are already experiencing lengthy delays and unacceptable levels of service, should not be forced to pay for programs unrelated to the service for which they have paid the fee—the processing of their applications. Also, since adjudications are as much in the national interest as enforcement, adjudications should receive on

an ongoing basis direct congressional appropriations to supplement user fees and build and maintain the infrastructure to support Immigration Services and its interrelationship with enforcement functions.

3. **Interior Security Subdivision:** This subdivision would include intelligence, investigations, and detention and removal (all currently in the INS/Justice Department.)

   Investigations: The Investigations Division currently is the interior enforcement arm of the Service. It is charged with investigating violations of the criminal and administrative provisions of the Immigration and Nationality Act (INA) and other related provisions of the U.S. Code. The Investigations Division's enforcement mission has five broad objectives: identify and remove criminal aliens; counter alien smuggling; counter immigration fraud; enforce employer provisions of the INA; and respond to community complaints regarding illegal criminal alien activity.

   Intelligence: As the principal source of immigration-related intelligence, the INS Intelligence Program currently provides analyses to INS staff at all levels to aid in making day-to-day, mid-term, and long-term operational decisions; acquiring and allocating resources; and determining policy. Intelligence is as important to the adjudications side of the immigration function as it is to the law enforcement side. In fact, adjudications include a strong security component for which intelligence is key. The recent implementation of IBIS checks that INS is currently conducting exemplifies the need for coordination between both sides of the INS house. In addition, the INS's forensics document laboratory, which is part of the INS intelligence program, assists INS adjudicators in detecting document fraud in petitions filed with the INS.

   Detention and Removal: This branch is responsible for detaining, transporting, processing and supervising illegal aliens who are awaiting removal or other disposition of their case. Especially given the changes in the law enacted in 1996, recent court decisions, and prosecutorial discretion in the law, it is vitally important that the law is consistently interpreted and that applicants' rights are protected.

THE DEPARTMENT OF HOMELAND SECURITY MUST ENSURE THAT IT DOES NOT OVERLOOK THE CIVIL RIGHTS OF AFFECTED PERSONS

The Homeland Security Department will fail in its mission if it does not pay close attention to another mission that belongs to all government agencies: the upholding and advancement of the Constitution and of the basic rights and liberties of all persons. Nothing could be more fundamental to any American undertaking. AILA therefore urges that a Division of Civil Rights and Oversight be formed within the Department of Homeland Security to ensure that the Department protects these rights. This Division is especially important given that the mission of the Homeland Security Department would prioritize enforcement and national security, leaving it questionable how civil liberty

concerns and considerations, as well as the protection of the provision of services for people seeking immigration benefits, would be addressed.

Given the extensive authority of the Department of Homeland Security, it is imperative that there be one office that can develop consistent interpretations of the law, one office to which people seeking benefits can turn if they feel they have been unjustly denied, one office to which people can go if they believe ethnic or racial proofing has occurred. The proposed Department of Homeland Security would lack credibility if there were no Division of Civil Rights and Oversight to focus exclusively on addressing these concerns.

THE STATE DEPARTMENT'S CURRENT ROLE IN VISA PROCESSING MUST BE PRESERVED

The Administration's proposal would place policy development for visa issuance in the hands of the Homeland Security Department, while leaving the ministerial function of issuing the visas with the State Department. AILA believes that dividing policy and process would result in chaos where the United States can least afford it—our international affairs. Every day, in consular posts around the world, issues arise as to how a policy or regulation, which was necessarily stated in broad terms, should apply in a specific case. Often, the cases that raise these questions can be of major consequence to our foreign policy interests, U.S. business interests, or the interests of preserving American values of family unity and humanitarian protection. The issues that arise in these contexts need to be resolved by those who best understand the reasoning and history behind the policy; namely, the department that develops the policy. But, if the policy was developed by a different agency, the nature of government agencies is such that the ability to resolve specific questions will be all but lost in the structure of different departments. As a result, policy implementation will become either disjointed or gridlocked. And, given the nature of the Department of Homeland Security, establishing an administrative presence all over the world at the staffing level required would be inappropriate and a waste of resources.

Indeed, a department devoted to internal security is best operated internally. But there are functions of the current INS that require a presence outside the United States. Primarily, these are refugee processing, orphan/adoption processing and the adjudication of waivers. AILA proposes that these functions be transferred to the State Department, which already possesses related expertise and has the needed infrastructure in the countries where these activities take place.

In addition, to maintain a fair and reasoned process for visa issuance, decisions regarding visa eligibility must be subject to appellate review. This review must apply to all of the functions transferred to the Department of State, which already are subject to such review, as well as to consular decisions. For example, as we have seen with recent decisions regarding international adoptions, checks and balances are needed to ensure that the legally correct decision is made.

EOIR MUST REMAIN OUTSIDE OF THE DEPARTMENT OF HOMELAND SECURITY AND BE CONSTITUTED AS AN INDEPENDENT AGENCY

AILA strongly opposes including the Executive Office for Immigration Review within the proposed Homeland Security Department. It is vitally important that our immigration courts be independent, impartial and include meaningful checks and balances. Any proposal that would include the EOIR in a new homeland security department is going in the absolutely wrong direction, as is evident by the EOIR's role, responsibilities and history.

Under authority delegated by the Attorney General, the EOIR administers and interprets federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases. The EOIR carries out these responsibilities through its three main components:

- The Board of Immigration Appeals (BIA), which hears appeals of decisions made in individual cases by immigration judges (IJs), INS District Directors, or other immigration officials;
- The Office of the Chief Immigration Judge (OCIJ), which oversees all the immigration courts and their proceedings throughout the United States; and
- The Office of the Chief Administrative Hearing Officer (OCAHO), which became part of the EOIR in 1987 to resolve cases concerning employer sanctions, document fraud, and immigration-related employment discrimination

The EOIR was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization that combined the BIA with the immigration judge function previously performed by the INS. Along with establishing the EOIR as a separate agency within the DOJ, this reorganization sought to make the immigration courts independent of the INS, the agency charged with enforcing federal immigration laws. The EOIR also is separate from the Office of Special Counsel for Immigration-Related Employment Practices in the DOJ Civil Rights Division and the Office of Immigration Litigation (OIL) in the DOJ Civil Division. As an office within the DOJ, the EOIR is headed by a Director who reports directly to the Deputy Attorney General.

The BIA is the highest administrative body for interpreting and applying immigration laws. Decisions of the Board are binding on all INS officers and IJs unless modified or overruled by the Attorney General or a federal court. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal. Other cases before the Board include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered.

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today. In these difficult times, the need for public confidence in

the integrity and impartiality of the system is great, especially when government agencies are accruing more power, and there is the need for an accompanying system of checks and balances that is the foundation upon which our system is built. At the same time, there is growing public cynicism about the impartiality and integrity of the system. Immigration judges who issue unfavorable opinions have been the object of interagency squabbles and acts of retribution. And, since many high-level managers at EOIR had been INS or DOJ employees, reports have emerged of cases being "administratively" resolved by an ex-parte phone call to a former colleague or high-ranking administrator, rather than through the appropriate appeals process.

The Department of Justice itself has often ignored the important role of IJs and the statutory authority that Congress has granted to them. As an example, the Attorney General, on October 31, 2001, issued an interim rule which insulates INS custody determinations from any IJ review by granting an automatic stay of release on Immigration Judge decisions where the initial bond was set by the Service at $10,000 or higher. Since the INS is the entity that sets the initial bond amount, this provision guarantees that the INS will be the final decision-maker on the issue of an alien's release from custody during the pendency of administrative proceedings, despite the fact that the law clearly entitles an alien to a bail re-determination hearing before an IJ.

The current system of housing immigration prosecutors and judges within the same agency is a disturbing concept, which creates, at the very minimum, the appearance of partiality. In this environment, it is not surprising that the public perceives this system as "rigged." Legal scholars who have studied our immigration system have made it clear that "the reviewing body must not only seem to be, but must in fact be free of command influence...What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees." (Richard B. Hoffman and Frank P. Cihlar, "Judicial Independence: Can It Be Done Without Article I?," 46 Mercer L. Rev. 863, 878 (Winter, 1995)).

AILA testified in February of this year before the House Subcommittee on Immigration and Claims against a proposed rule that would make a number of procedural reforms at the BIA that, taken together, would amount to a denial of due process. We believe bringing the EOIR within the new Homeland Security Department raises similar objections. In fact, AILA advocates the creation of a separate, Executive Branch agency that would include the trial-level immigration courts and the BIA. Such an independent agency would best protect and advance America's core legal values by safeguarding the independence and impartiality of the immigration court system. Due process requires no less.

Specifically, AILA believes that the creation of an independent immigration court should be based on the following considerations:

- The independence and impartiality of the immigration judges and the immigration court system must be affirmed;

- Proposed changes must facilitate, not erode, immigrants' access to the BIA and federal courts, consistent with due process considerations in our justice system; and

- Such changes must also enhance efficiency, increase accuracy, acceptability, accountability and consistency, and facilitate oversight and review.

CHANGING OUR IMMIGRATION LAWS TO HELP ENHANCE OUR SECURITY, ECONOMY, AND SOCIETY

The goals of a new Homeland Security Department cannot be achieved until our immigration laws are reformed. The creation of this department will not alter the fact that U.S. immigration policy needs to be changed to make legality the norm. Currently, families face long delays before they can be reunited, no visa exists to bring in certain kinds of needed workers, and the 1996 immigration laws eliminated due process for many legal permanent residents. Furthermore, the status quo is unacceptable in a world in which enhanced security has become a higher priority.

An agreement between the United States and Mexico on immigration and border issues will help the U.S. address national security concerns. Bilateral cooperation in enforcement initiatives that focus on illegal immigration, the opportunity for hardworking immigrants already here filling legitimate labor needs to earn legal status, a new temporary program for essential workers to fill identified labor needs, and more visas for workers and family members are initiatives that together will contribute to our security. Because our shared security needs create the additional impetus for Mexico and the U.S. to coordinate and cooperate, it follows that by encouraging and facilitating legal immigration, both countries will be able to focus their resources on terrorists and people engaged in smuggling, trafficking, and other criminal activities.

The following principles are essential to successful immigration reform that enhances our security, as well as our economy and society.

1. Approaching Immigration Reform in a Comprehensive Manner: The United States' current immigration system needs to be reformed to reflect current needs and realities. Due to our current system, families are separated for long periods of time and U.S. employers cannot bring in needed workers. People are forced to live an underground existence in the shadows, not making themselves known to the government for fear of being separated from their families and jobs. The current enforcement system has failed to prevent illegal immigration and precious resources that should be spent on enhancing security are wasted on stopping hard-working people from filling vacancies in the U.S. labor market. Border enforcement efforts that do little to enhance our security have led to people losing their lives, while current laws make it difficult for many to enter legally. Our

immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

2. Implementing Immigration Reform as an Important Component of our Enhanced National Security. Immigration reform that legalizes hard-working people already here and that creates a new temporary program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market or seeking to reunite with their close family members. In addition, reform that includes a new legalization program and a temporary worker program will encourage people to come out of the shadows and be scrutinized by our government. The legality that results from these initiatives will contribute to our national security.

3. Developing a Regularization Program for People in the U.S. without Authorization: People who work hard, pay taxes, and contribute to the U.S. should be given the opportunity to obtain permanent residence. This legalization would stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, liberal and generous waivers must be made available for grounds of admissibility and deportability. It is neither in the best interests of the workers nor of their employers for this situation to remain unaddressed.

4. Creating a New Temporary Worker Program: Current immigration laws do not meet the needs of our economy for short- and long-term employees in those sectors currently experiencing worker shortages and others that are expected to experience shortages when the economy rebounds. A new temporary program would give workers the opportunity to work in areas of the country where they are needed and would give employers experiencing shortages the workforce they need. Current programs have often proven unusable by both employees and employers, and do not accommodate employers facing longer term, chronic labor shortages. The framework for a new temporary worker program must differ significantly from existing programs, and must respect both the labor needs of business as well as the rights of workers.

5. Opening Up Legal Channels for Family- and Business-Based Immigration: Our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, it is critical to reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make

immigration more orderly and legal. It will also allow more people to reunite with their families and work legally in the U.S., and will facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.

6. Adequately Funding Immigration Reform Initiatives: Immigration reform must include adequate funding to implement reform. Congress frequently passes new immigration laws without including adequate funding. Lack of adequate funding has contributed to the long backlogs and ineffective, inefficient and unfair services that currently characterize the Immigration and Naturalization Service (INS). Whether funds are directed to the INS or other entities to implement reform, any changes in the law must be accompanied by adequate funding, in the form of direct congressional appropriations.

CONCLUSION

The same criteria that are essential to an effective reorganization of the INS are key to immigration in the context of any national homeland security department discussion: It is necessary to have one person in charge of the immigration function and to coordinate the separated enforcement and adjudication activities. In addition, the services/adjudications function merits adequate funding, no less because adjudications is as much in the national interest as is enforcement. Such a reorganized immigration function (modeled on provisions in S. 2444) is best left outside of the Homeland Security Department, with coordination mandated between the two. If immigration is included within the Homeland Security Department, then AILA supports the creation of a separate division (Immigration Services and Security) to best support our immigration function (that also would use S. 2444 as the model for reform).

Clearly more needs to be done, but since September 11, the status quo already has undergone much positive change, with federal agencies (INS, Customs, Coast Guard and the other border agencies) coordinating and cooperating at unprecedented levels to improve the processes at the border to protect our homeland and efficiently process legitimate trade and travel. Furthermore, the new Enhanced Border Security and Visa Entry Reform Act addresses many concerns about improving cooperation and information sharing, as well as tackling problems with existing systems.

As Congress debates the creation of a Homeland Security Department, we must recognize the need both to reform our immigration function, and change current immigration laws to make legality the norm. The success of a new Department of Homeland Security is directly linked to reforming our immigration laws so that they make sense for and to a nation of immigrants.

Mr. Chairman, thank you very much for this opportunity to share my thoughts and perspectives with the committee. I and other members of AILA remain available to discuss these matters with you at any future time. We look forward to working closely with you on legislative efforts to enact needed changes. 28ts2006